

**NATIONAL
IMMIGRANT
JUSTICE CENTER**
A HEARTLAND ALLIANCE PROGRAM

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Re: [Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020](#)
("Proposed Rules")

Dear Assistant Director Reid and Chief Dunn,

The National Immigrant Justice Center ("NIJC" or "we") works to advance the rights of all immigrants, including asylum seekers and torture survivors. With the above-referenced Proposed Rules the Department of Justice (DOJ)'s Executive Office of Immigration Review (EOIR) and the Department of Homeland Security (DHS) (collectively, the Departments) eviscerate U.S. and international law protecting individuals fleeing persecution and torture. Therefore, NIJC writes to express our strong opposition to the Proposed Rules and call for their rescission.

The Proposed Rules are the latest, most comprehensive assault on the right to asylum yet seen, amongst a barrage of anti-asylum policies and regulations.¹ Here, the Departments propose an unlawful overhaul of the U.S. asylum system, masquerading as reasonable regulatory

¹ See Letter signed by 34 U.S. Senators calling on the Administration to rescind all anti-asylum policies, including these Proposed Rules due to conflict with U.S. and international law, June 19, 2020, <https://www.blumenthal.senate.gov/imo/media/doc/Asylum%20letter%206.19.20%20.pdf>.

interpretations. These Proposed Rules would harm countless refugees, confound adjudicators, and violate existing statutory and Constitutional protections. NIJC urges the Departments to withdraw the Rules in their entirety and ensure that a full and fair asylum system is made accessible to all who seek safety here.

NIJC's strong interest and opposition to proposed changes

NIJC is dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to and advocates for these populations through policy reform, impact litigation, and public education. Since its founding more than three decades ago, NIJC uniquely blends individual client advocacy with broad-based systemic change.

Headquartered in Chicago, NIJC provides legal services to more than 11,000 individuals each year, including many asylum seekers, torture survivors, and unaccompanied children who have entered the United States by crossing the U.S.-Mexico border. These individuals have overcome unimaginable persecution and torture in their home countries and journeyed to the United States in hopes of finding a better future. Under these Proposed Rules, the ability for many to access safety is effectively destroyed. As our comments explain further below, the Proposed Rules are not reasonable interpretations of statutory requirements, but a wholesale ban on asylum seekers and torture survivors. NIJC strongly condemns these unlawful, nonsensical, indefensible regulatory changes to asylum law which will send countless migrants back to certain harm or death. For these reasons, NIJC calls for immediate rescission of the Proposed Rules.

Finally, the Proposed Rules will severely impact NIJC at multiple levels. In addition to providing counsel to asylum seekers in the Midwest, NIJC has a program in San Diego, CA designed to assist asylum seekers in expedited removal. NIJC also provides direct representation to asylum seekers and separated families at the border in Texas. Through years of litigation, NIJC has garnered extensive experience and expertise in litigating asylum claims based on persecution on account of gender, LGBTQIA+ status, and gang violence. NIJC has hired and trained a large number of attorneys, who in turn provide consistent support, subject-matter expertise, and training for thousands of *pro bono* counsel and public defenders. As such, NIJC has a reliance interest in the integrity of credible and reasonable fear interviews, as well as the asylum process Congress designed to protect those fleeing harm on the basis of protected grounds. The proposed changes will not only nullify years of NIJC advocacy under U.S. and international law; it will also undermine the provision of life-saving services to asylum seekers because of the drastic overhaul proposed by the Departments.

As one NIJC client succinctly put it, “many of the people will be hurt; it isn’t just a [proposed] rule, it’s their life. Many of these people will return to their countries and won’t tell their stories

any longer, because they won't exist."² Indeed, our review of these proposed changes makes clear that these Proposed Rules are engineered to return the majority of asylum seekers to persecution or torture. Congress tried to avert these injustices by designing a reliable asylum process; the Proposed Rules flout Congress' plain language and intent with scant mercy for the countless lives at stake.

Objection to the expedited time frame for these Proposed Rules

In light of NIJC's interest in commenting on the substance of the Proposed Rules, NIJC strongly objects to the expedited timeframe for this proposed rule. We draft these comments from the epicenter of this global pandemic that has already afflicted 3.4 million lives with this highly infectious disease and killed 136,699 in the U.S.³ Rather than mourn and recover from this tragedy, the U.S. has been plunged back into a sharp spike in reported cases throughout the country. Rushing the comment period in the midst of a crisis of such historical magnitude is not just unreasonable; it raises serious questions as to the Departments' motives in evading valuable scrutiny, while upending decades of asylum law within half the time normally granted for public comment.⁴

Specifically, this timeframe impairs NIJC's ability to prepare thorough comments, as the entirety of our staff are currently required to work remotely and face disruptions in normal modes of attorney-client communication. NIJC is far from alone in our constrained capacity; NIJC joined 502 stakeholders struggling to review, assess, and substantively comment on the devastating consequences of this 162-page Notice of Proposed Rulemaking in urging the Departments to extend the comment period to 60 days—a request the Departments ignored.⁵ In light of these circumstances, the truncated notice-and-comment period flies in the face of reasonable regulatory practices.

² See Comment of Helen Doe, as submitted by Nayna Gupta; Tracking Number: [1k4-9htv-9hao](#).

³ See Johns Hopkins University, Coronavirus Resource Center, World Map (last accessed on July 15, 2020), <https://coronavirus.jhu.edu/map.html>.

⁴ See Office of Management and Budget Office of Information and Regulatory Affairs <https://aboutblaw.com/PWO> (acknowledging that "COVID-19 has disrupted the lives and work of many Americans, including some potential commenters" and calling on administrative agencies to assess the "need to allow more time for preparation of comments outweighs any need for urgency in rulemaking").

⁵ Request to Provide a Minimum of 60 days for Public Comment in Response to the Department of Homeland Security United States Citizenship and Immigration Services and Department of Justice Executive Office for Immigration Review Joint Notice of Proposed Rulemaking, June 18, 2020, <https://www.tahirih.org/wp-content/uploads/2020/06/Request-for-Extension-of-Asylum-Rule-Comment-Period-from-502-organizations.pdf>. The Departments have failed to respond to this overwhelming call for an extension of the time period for these comments.

More specific comments follow. Thank you for your consideration and please do not hesitate to contact Azadeh Erfani for further information.

/s/ Azadeh Erfani

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DETAILED COMMENTS

In opposition to Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review; RIN 1615-AC42 / 1125-AA94 / EOIR Docket No. 18-0002/ A.G. Order No. 4714-2020

Our comments below review the substantive changes put forward in the Proposed Rules to screenings in expedited removal and changes to eligibility for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). In Section I, we focus on the alarming changes to the screening of asylum seekers and torture survivors in expedited removal, where the Departments curtail access to fair screenings and judicial review. Sections II and III delve into the Departments' indefensible redefinition of "frivolous" asylum applications and dramatic expansion of preemption, both designed to harm the most vulnerable asylum seekers and to violate the Due Process Clause. In Section IV, we object to the codification of social distinction and particularity and urge the Departments to return to the sound, long-accepted definition of particular social group in *Matter of Acosta*; the Departments further seek to fold existing *and* new statutory bars to asylum into the definition and penalize asylum seekers who fail to navigate this extremely complex area of law. The Departments' attempt to redefine political opinion does not survive precedent, logic, or scrutiny, as Section V explains. In Section VI, we analyze how the Departments' revamped approach to persecution betrays a poor understanding of key elements of asylum law and improperly raise the standard without reasonable justification. With nexus (Section VII), the Departments craft new nonsensical, duplicative, and offensive bounds that bear little to no resemblance to the statutory requirement. In Section VIII, we analyze how the Departments' proposed changes to internal relocation undermine the principle of fact-based, case-by-case decision-making in the asylum process. Section IX denounces a common theme of these Proposed Rules: the abuse of the regulatory process to bypass Congress and create new bars to asylum—here, by inserting fourteen new bars to asylum while purporting to update the regulatory definition of discretion. This theme continues in Section X, where we address the Departments' efforts to redefine firm resettlement beyond logic and improperly insert new (and recycle prior) bans on asylum. Next, we examine the changes proposed to CAT eligibility in Section XI, which have been widely rejected by federal circuit courts and needlessly obstructs protection for torture survivors. Finally, NIJC finds no justification for the Departments' relaxed confidentiality provisions in Section XII.

Throughout the detailed comments below, NIJC cites to many decisions from federal courts of appeals. Contrary to the Departments' prefatory footnote 1, these proposed regulations do not supersede the legal precedents cited. For such supersession to follow, the Departments must present a reasonable or rational interpretation of an ambiguous statute. The Departments' rushed regulatory analysis clouds unambiguous sections of asylum law and advances unreasonable and

arbitrary interpretations throughout.⁶ As such, these proposed regulations do not presumptively supersede binding precedent. To the contrary, they run afoul of binding precedent that they cannot legitimately override.

I. The Proposed Changes in these Rules Would Short-Circuit Initial Screenings, Paving the Way for the Swift Deportation of Asylum Seekers and Torture Survivors.

A. Asylum-and-Withholding-Only Proceedings Curtail Access to Relief Provided by Congress.

These Proposed Rules intend to eliminate access to full judicial review for those subject to expedited removal. The population of individuals subject to expedited removal is vast, and the government is working to extend beyond its breaking point.⁷ *MRNY* upheld the government’s proposal to expand expedited removal to include anyone who comes into contact with immigration officials nationwide who cannot prove two years of physical presence in the United States. The legality of that Rule is still being litigated in *MRNY*, but if it stands, these Proposed Rules will eliminate access to judicial review for a wide array of noncitizens who are placed into removal proceedings, including newly arrived asylum seekers and individuals already residing in the United States who fear return to their home countries.

Under the current system, anyone subject to expedited removal must prove that she has a “credible fear” of persecution, and if she makes that showing to an asylum officer (AO), she gets to see a judge for “full” removal proceedings. There, the applicant can apply for any relevant form of relief—including for example, adjustment of status if the applicant marries a United States Citizen and is otherwise eligible. The Proposed Rules limit forms of relief available to asylum, withholding of removal, and protection under CAT, making it impossible to seek other forms of relief.

The Proposed Rules would be devastating to those who are paroled from detention into the United States to await adjudication of their cases. Because of backlogs, those individuals could be in the United States awaiting adjudication for a period of years, yet they would be ineligible for any additional remedy that may be available based on their time in the United States.

⁶ The Departments cite to *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.* to support their contention that these Proposed Rules supersede precedential decision. 545 U.S. 967 (2005). However, *Brand X* merely reiterated the two-step method in *Chevron* analyzing the ambiguity of the underlying statute first, and then the reasonableness of the agency’s interpretation. See *Brand X Internet Servs.*, 545 U.S. at 986 (citing *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984)). *Brand X* did not license the Departments to shoulder off binding precedent and grant force-of-law to their unreasonable interpretations.

⁷ See *Make the Road New York v. Wolf (MRNY)*, No. 19-5298, 2020 WL 3421904, at *5 (D.C. Cir. June 23, 2020).

Further, when considered with the Rule in *MRNY*, the Proposed Rules could have a devastating impact on all noncitizens who come into contact with immigration but cannot prove—immediately after their encounter with immigration—that they have been here for more than two years. These individuals with a long-term presence in the United States may qualify for many different forms of relief, including cancellation of removal, but they will not be able to seek that relief if they are placed in “asylum and withholding only” proceedings.

The Proposed Rules do allow for an appeal of a denied application for asylum to the Board of Immigration Appeals (BIA or “Board”). They do not, however, appear to contemplate the ability to challenge being placed in such “asylum only” proceedings to the BIA, nor does they expressly permit access to federal court review in the United States Courts of Appeals.

The Proposed Rules are illegal in three primary ways. *First*, The Immigration and Nationality Act (INA) contemplates only two forms of removal proceedings—expedited removal (under 8 U.S.C. § 1225), and full removal proceedings (under 8 U.S.C. § 1229a). The Departments cannot, by regulation, create a new process for removal that is not contemplated by statute. (That the Departments has a similar process for stowaways does not justify the creation of a process not contemplated by the statute for such a broad class of people.)

Second, the Proposed Rules eliminate the possibility of applying for many forms of relief for which a person may qualify. In particular, some noncitizens can seek a waiver of inadmissibility en route to permanent status, and one waivable ground of inadmissibility is entry into the United States without inspection. The Proposed Rules cut off access to applications for these waivers and to the discretionary relief follows. The existence of these remedies in the INA indicates that an individual must be afforded an opportunity to apply for them, which these Proposed Rules illegally curtail.⁸

Third and finally, the apparent absence of judicial review provisions runs contrary to the strong presumption in favor of judicial review of agency action.⁹

⁸ See, e.g., *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 771 (9th Cir. 2018) (noting that it is the “hollowest of rights that an alien must be allowed to apply for [discretionary relief]” if a regulation renders an applicant ineligible for that form of relief); *United States v. Roque-Espinoza*, 338 F.3d 724, 729 (7th Cir. 2003) (“There may be an important distinction between an alien’s claim that she has a right to seek discretionary relief, and the very different claim that she has a right to have that discretion exercised in a particular way.”).

⁹ See *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020) (citing *Kucana v. Holder*, 558 U.S. 233, 251 (2010) and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496, 498 (1991)).

B. Consideration of Precedent When Making Credible Fear Determinations Undermines the Validity of Threshold Screenings.

These Proposed Rules require the legal standard that applies in the Credible Fear process to be dictated by the law where the interview occurs, which for many entrants into the United States will require the application of the law of the Fifth Circuit Court of Appeals.

This provision is contrary to case law and to the statutory principle that a credible fear screening must be a threshold review, subject to a relatively low barrier.¹⁰ In *Grace* the Court agreed with the plaintiffs' argument that the credible fear standard "requires an alien to be afforded the benefit of the circuit law most favorable to his or her claim because there is a possibility that the eventual asylum hearing could take place in that circuit."¹¹ In reaching this conclusion, the Court noted that "When Congress established expedited removal proceedings in 1996, it deliberately established a low screening standard so that 'there should be no danger that an alien with a genuine asylum claim will be returned to persecution.'"¹² The Court further noted that Congress "reject[ed] the higher standard of credibility included in the House bill."¹³ The Proposed Rules do nothing to account for this history.

This change in the standard is important because, under the Proposed Rules, a person could be deported even if she might have a "significant possibility" of being granted asylum by a judge.¹⁴ This outcome is particularly likely in cases involving membership in a particular social group (PSG) where case law from around the country is divergent as to the applicable standard. As the Court said in *Grace*, the approach announced in the Proposed Rules "leads to the exact opposite result intended by Congress."¹⁵

C. The Provision Removing and Reserving DHS-Specific Procedures from DOJ Regulations Are Presented as Benign but Will Result in Prolonged Detention of Asylum Seekers.

This Provision is presented as a benign technical removal of regulations from the DOJ provisions while retaining the parallel DHS regulations. There is no discussion in the Proposed Rules as to why this action is being taken, but it appears to be an attempt to codify in regulation the

¹⁰ See *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).

¹¹ *Id.* at 139.

¹² *Id.* (quoting H.R. REP. No. 104-469, pt. 1, at 158).

¹³ *Id.* (quoting 142 Cong. Rec. S11491-02).

¹⁴ *Id.*

¹⁵ *Id.* at 140.

government's position that Immigration Judges (IJ) have no authority to consider individuals who were formerly in expedited removal (before a successful credible fear interview) for bond.

The Attorney General attempted to make this rule via an agency decision in *Matter of M-S-*, 27 I. & N. Dec. 509 (AG 2019), but that decision has been enjoined on the basis that it likely violates Due Process.¹⁶ The Proposed Rule makes no mention of this fact and in fact seems to be intentionally obscuring its relationship to it.

D. Raising the Standard of Proof for Statutory Withholding of Removal and Torture-Related Fear Determinations Will Result in Asylum Seekers Returned to Harm and Torture.

The primary objective of this section is to raise the screening standard for refugees subject to expedited removal and subject to credible fear interviews (CFIs). It does so by:

- *Requiring applicants to demonstrate a “significant possibility” of success on a CAT/withholding claim:* Currently, an applicant demonstrates a credible fear if she shows a “significant possibility . . . that [she] could establish eligibility for asylum.”¹⁷ The Proposed Rules replace “eligibility for asylum” with an assessment on the merits of eligibility for withholding or CAT protection for those individuals whom the Departments determine to be limited to these lesser forms of protection. In doing so, the Proposed Rules propose a bifurcated system whereby the AO would first determine whether the applicant was eligible for asylum or if, instead, she was limited to withholding and CAT (lesser forms of protection).
- *Inserting consideration of potential bars into threshold screening:* By requiring a different approach at screening for asylum, withholding, and CAT, the Rule adds to the threshold screening process complex subjects currently explicitly excluded from these brief interviews. In particular, current regulations state that “novel” legal questions and consideration of potential bars to asylum are *not* to be considered in a threshold screening interview.¹⁸ This limit exists because consideration of those factors is more complex and incompatible with the nature of a threshold screening interview.
- *Expanding the approach initiated with the Administration’s prior illegal regulations:* The Proposed Rules cite two prior interim final rules, both of which have been enjoined

¹⁶ See *Padilla v. ICE*, 953 F.3d 1134 (9th Cir. 2020).

¹⁷ 8 U.S.C. § 1225(b)(1)(B)(v) (emphasis added).

¹⁸ See 8 C.F.R. § 208.30(e)(4) (requiring officers to consider whether a case presents a “novel” issue that “merit[s] consideration in a full hearing”); 8 C.F.R. § 208.30(e)(5)(i) (dictating that individuals who appear to be subject to bars to asylum “shall nonetheless” be placed into full removal proceedings before a judge).

and/or vacated as illegal.¹⁹ Specifically, because the vacated Rules created (illegally) broad categories of individuals who were ineligible for asylum, the Departments mandated a higher screening standard for individuals subject to those bans. These Proposed Rules propose a higher screening standard in all instances when an applicant is subject to a general bar to asylum.

The Proposed Rules claim “it is reasonable for [a noncitizen’s] associated screening burden to be correspondingly higher” when that noncitizen is only eligible for the more limited relief of withholding and CAT.²⁰ The Departments reason that this approach, “better aligns the initial screening standards of proof with the higher standards used to determine whether aliens are in fact eligible for these forms of protection before IJs.”²¹ On the surface that approach may seem reasonable, but it is improper for numerous reasons.

First, the remainder of this proposed rule imposes a “bar” to asylum for nearly all prospective applicants. The applicability of that “bar” will now happen at a threshold-screening interview, with no opportunity to challenge it. An applicant who could satisfy the easier “credible fear” standard but cannot satisfy the higher standard will now face removal without a full hearing before a judge. The Departments justify this approach by reasoning that “the ultimate eligibility standards remain the same.”²² But this statement overlooks the fact that, by introducing these higher standards earlier in the process, meritorious claims will never be adjudicated under “the ultimate eligibility standard.”

Second, although the Departments claim that this approach is “consistent with congressional intent,” that claim is far from true.²³ The Congressional record made it clear that “there should be no danger that an alien with a genuine asylum claim will be returned to persecution.”²⁴ Further, the Departments claim that the use of a higher standard is appropriate because individuals subject to reinstatement of a prior removal order under 8 U.S.C. § 1231(a)(5) and individuals convicted of aggravated felonies and thus subject to “administrative” removal orders, are already held to such a standard in the Reasonable Fear Interview (RFI) Process. But reliance on the RFI process

¹⁹ See *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (upholding injunction as to Nov. 2018 Rule); *O.A. v. Trump*, 404 F. Supp. 3d 109, 118 (D.D.C. 2019) (finding illegal on the merits Nov. 2018 Rule); *Capital Area Immigrants’ Rights Coal. v. Trump*, No. CV 19-2117 (TJK), 2020 WL 3542481, at *1 (D.D.C. June 30, 2020) (vacating as illegal July 2019 Rule).

²⁰ Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36264, 36269.

²¹ 85 Fed. Reg. at 36270.

²² 85 Fed. Reg. at 36271.

²³ *Id.*

²⁴ See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 104 (D.D.C. 2018) (citing H.R. REP. NO. 104-469, pt. 1, at 158 (1996)).

ignores that the bars to asylum provided for in those two contexts are *statutory* in nature.²⁵ By applying that standard to bars to asylum created by regulation, the Departments seek to insulate their own actions from judicial review.

Applicants who should qualify for asylum based on their membership in a PSG—for example, women who are unable to leave abusive relationships, LGBTQIA+ people, people who face persecution based on kinship—are likely to be deprived of their opportunity to see a judge *at all*. The Departments claim that this Rule is designed to “better screen out non-meritorious claims,”²⁶ but by raising this standard, this Rule will turn away countless asylum seekers with meritorious claims.

E. Proposed Amendments to the Credible Fear Screening Process Will Strip Away Most Asylum Seekers’ Access to a Day in Court.

Subsection 5, in general, introduces the mechanical means by which the Departments propose introducing the substantive changes outlined above. In particular it expressly confirms that the consideration of any and all bars to asylum should take place as part of the threshold screening interview process. As discussed prior, this approach is significant because nearly everyone will be subject to a bar to asylum if the remainder of this Rule is allowed to take hold, and if that occurs, most people will receive a negative determination from the credible fear process and will never have an opportunity to see a judge.

This subsection also introduces three additional problematic factors; specifically, the Departments:

- *Add internal relocation analysis to the screening process:* In order to qualify for protection, applicants must demonstrate that they could not reasonably relocate within their own countries to avoid persecution or torture. Now an applicant will be required to prove this element at the first instance they speak to the government, generally within days or hours of arrival.
- *Authorize the Departments to infer a meaning of “no fear” from an applicant’s silence.:* The Departments state that they “seek to treat an alien’s refusal to indicate whether he or she desires review by an IJ *as declining to request* such review” both in the credible fear and in the reasonable fear process.

²⁵ See 8 U.S.C. §§ 1231(a)(5); 1158(b)(2)(B)(i).

²⁶ 85 Fed. Reg. at 36271.

- *Collapse two grounds of inadmissibility (INA 212(a)(6) and 212(a)(7))*: The Rule proposes a single “exclusive procedure” for applicants who are inadmissible under one of these two grounds, even though they are distinct in their nature.

The Departments claim that “it is pointless and inefficient to adjudicate claims for relief in section 240 proceedings when it is determined that an alien is subject to one or more of the mandatory bars to asylum or statutory withholding at the screening stage.”²⁷ But this claim, as discussed prior, only serves to insulate the creation of illegal bars to asylum from judicial review. Under this scheme, if an asylum seeker is funneled into withholding-only proceedings or CAT relief based on the application of an illegal bar, and if she cannot survive the significantly higher screening standard for withholding or CAT, she will never have a chance to challenge the application of that illegal bar to her.

Adding internal relocation is likewise problematic because it requires proving a nuanced and document-specific aspects of asylum in a screening interview. Overcoming internal relocation requires consideration of the applicant’s personal circumstances, reasonableness, and a thorough review of the conditions in the country of persecution.²⁸ It may also turn on the identity and classification of the persecutor. Expecting an asylum seeker to arrive in the United States with country conditions evidence that would demonstrate their inability to relocate throughout their country is unrealistic. More significantly, for applicants who have suffered past persecution, they are entitled to a *presumption* of future persecution that can be overcome by the government demonstrating that internal relocation is possible.²⁹ Importing this analysis into the threshold screening interview process, which is supposed to be non-adversarial, assigns the burden to the wrong party.

The Departments’ effort to equate an applicant’s silence with a refusal to request IJ review of an adverse credible or reasonable fear determination is particularly harmful. For many applicants, these statements occur in the context of a prosecution under 8 U.S.C. §§ 1325 or 1326 for illegal entry or reentry. In that context, applicants are, in accordance with *Miranda v. Arizona*, reminded of their right to remain silent and of the fact that their statements can be used against them. The Departments’ approach would undermine *Miranda* and would improperly penalize noncitizens for invoking their rights under the Sixth Amendment.

DHS has already tried to take silence in the context of a criminal proceeding as an indication that an applicant does not have a fear of persecution. V. is a member of the LGBTQIA+ community

²⁷ 85 Fed. Reg. at 36272.

²⁸ As NIJC reviews in Section VIII *infra*, the Departments’ proposed revision of internal relocation is untenable even where asylum seekers have access to judicial review.

²⁹ See 8 C.F.R. § 208.13(b)(1)(ii).

from Guatemala. V. entered the United States without inspection and was prosecuted for illegal entry. At the time of the prosecution, a DHS Customs and Border Protection (CBP) officer read V. *Miranda* warnings and then proceeded to ask questions about fear and present papers relating to the credible fear process. V. refused to sign or speak, and instead asked for counsel. In V.'s subsequent criminal case, the federal defender explained that V. was seeking asylum, and even referred V. to become a plaintiff in a challenge to the Transit Ban on asylum.³⁰ In both the criminal and civil case, V. repeatedly indicated a desire to seek asylum. Those efforts included a request by counsel to be schedule for a CFI. While that request was pending and before any action was taken, V. was deported to Guatemala. In other words, DHS took V.'s silence while in criminal custody and immediately following a *Miranda* warning as an expression of no fear, despite all subsequent indications to the contrary and removed V. without ever giving them a chance to seek protection.

II. The Departments' New Definition of Frivolous Is Broad Beyond Logic, Violates Due Process, and Will Clog Immigration Courts.

This Proposed Rule dramatically lowers the bar for findings of frivolous applications, subjecting a wide array of asylum seekers to summary denials or deportation proceedings. Specifically, the Departments expand the definition of “knowingly” made frivolous statements to “willful blindness” and define frivolous as “clearly unfounded” and “abusive” applications.³¹ In the same stroke, the Departments overrule their own binding precedent *Matter of Y-L-* and run afoul of the Due Process Clause. There are at least three substantial flaws with the Departments' reasoning: 1) their revision of the definition of “frivolousness” is illogical and unreasonable; 2) the Departments' rule would contravene Due Process rights; 3) the proposed rule would pave the way for summary denials that would further clog immigration courts.

A. The Departments' Expanded Definition of Frivolousness Makes Unfounded Assumptions about Unrepresented and Vulnerable Asylum Seekers.

The Departments expand the definition of frivolousness in a number of ways. First, they remove the requirement that a fabrication be “deliberate,” suggesting that asylum applicants who are unaware that an essential element is fabricated may be caught up in the rule. The Proposed Rules also remove the requirement that the fabrication be “material,” adding a vague substitute that

³⁰ Although the Departments attempt to insert an iteration of this ban throughout the Proposed Rules, this ban has since been enjoined or vacated by two federal courts. See *East Bay Sanctuary Covenant v. Barr*, --- F.3d ----, 2020 WL 3637585 (9th Cir. 2020); *Capital Area Immigrants' Rights Coalition v. Trump*, --- F.Supp.3d ---, 2020 WL 3542481 (D.D.C. 2020).

³¹ 85 Fed. Reg. at 36264, 36273-74.

may confound adjudicators and spur legal battles.³² The Departments further encourage findings of frivolousness for applications submitted “without regards to the merit” or “clearly foreclosed by applicable law”—vague, irrelevant, yet punitive additions to strike out asylum applicants, regardless of the validity or truthfulness of their claims.³³

These additions would entrap unrepresented and vulnerable asylum seekers. Many asylum seekers are not sophisticated litigants, do not speak English, and may have a basic education level.³⁴ Yet, under the Proposed Rules, they could easily make earnest mistakes or advance claims that will result in a finding of frivolousness. The Departments encourage the application of the frivolousness standard to not only false claims, but claims that a judge finds to be “clearly unfounded” or “abusive,” prompting IJs to punish truthful, often unrepresented asylum applicants for their failure to navigate complex laws and regulations.

The complexity of immigration law has long been noted.³⁵ As proposed, the rules could subject an asylum seeker to a frivolousness finding if she files an asylum claim that is true in all particulars, but which fails under BIA or circuit precedent due to lack of social distinction, particularity, and similar rules. Over decades of asylum practice, NIJC attorneys have observed that the opacity and complexity of U.S. asylum laws and jurisprudence means that, in the ordinary case, asylum seekers themselves are quite ill-positioned to properly estimate the legal system’s openness to their claims. Under these Proposed Rules, an asylum seeker could be penalized merely for seeking their long-awaited day in court and presenting the unique facts of their case.

Moreover, this new standard will also potentially cause ethical problems for attorneys who have to balance their duty to raise all potential claims for relief and avert the severe consequences of frivolous findings.³⁶ Dutiful attorneys are obligated to raise legal arguments which are currently foreclosed by binding precedent if they have the opportunity to reverse that precedent on appeal.

³² See 85 Fed. Reg. at 36264, 36295, 36304 (to be codified at 8 C.F.R. §§ 208.20, 1208.20) (defining applications premised on false or fabricated evidence as frivolous “unless the application would have been granted without the false or fabricated evidence”).

³³ 85 Fed. Reg. at 36295, 36304.

³⁴ Chicago Appleseed Fund for Justice, *Assembly Line Injustice: Blueprint to Reform America’s Immigration Courts* 29 (2009), Available at https://www.appleseednetwork.org/uploads/1/2/4/6/124678621/assembly_line_injustice-blueprint_to_reform_americas_immigration_courts.pdf.

³⁵ See, e.g., *Lok v. Immigration and Naturalization Service*, 548 F.2d 37, 38 (2d Cir. 1977) (“We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos’s labyrinth in ancient Crete.”).

³⁶ See *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (BIA 2018).

Under the rule, advancing diverse claims could be grounds for severe sanctions on the asylum seeker.³⁷

The expanded definition of frivolousness would also penalize asylum seekers who fall prey to faulty or fraudulent counsel. NIJC has represented a number of clients who have suffered notary fraud, inadequate past representation, or simply had no inkling what their prior counsel had written on their behalf. These clients include children whose relatives have supplied counsel who proceeded to file evidence and statements on the child's behalf without her review and assent on the factual representations made. In one case, NIJC represented a woman who had been subject to a forced abortion in China; rather than delve into the particular facts of her case, her prior counsel concocted an unrelated claim about Tiananmen Square. In these cases, NIJC was able to withdraw or amend the asylum applications in order to correct the record and win these clients protection. However, under the current rules NIJC would be unable to cure these misrepresentations and the Departments would impute all errors to truthful asylum seekers.

Finally, this expanded definition will especially harm detained asylum seekers, who already have restricted means to gather and present evidence. This Administration has extensively detained asylum seekers.³⁸ While detained, represented asylum seekers face tremendous barriers to communicate with their attorneys and relatives in preparation for their merits hearing.³⁹ Consequently, asylum seekers are often unable to review the evidence obtained and submitted on their behalf. As for *pro se* asylum seekers in detention, they are very likely to proceed on video teleconference and via limited, consecutive interpretation; their ability to hear and actively participate in their own hearing is not guaranteed, let alone their ability to avert the broad categories that would result in their claims being labeled as frivolous under this Rule.

³⁷ Moreover, the willful blindness standard seems to impose on asylum seekers a duty to try to understand asylum law enough to correctly perceive if their attorney is prosecuting the claim in a way consistent with circuit and agency case law. This level of interference with the attorney's tactical decisions may create a conflict between a competent attorney and her client.

³⁸ *Damus v. Nielsen*, 313 F. Supp. 3d 317, 342 (D.D.C. 2018) (“The record indicates that . . . [asylum seekers] are subject to a de facto ‘no-parole’ reality, under which detention has become the default option.”).

³⁹ One recent study found that “nondetained respondents were almost five times more likely to obtain counsel than detained respondents.” Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015). The location of detention centers force attorneys to “travel long distances to visit their clients.” *Id.* at 35. See also *Detention Facilities Locator*, U.S. Immigration and Customs Enf’t, <https://www.ice.gov/detention-facilities>. Restrictions on telephone access create another obstacle to effective representation. See *Lyon v. United States Immigration and Customs Enf’t*, 171 F. Supp. 3d 961, 983 (N.D. Ca. 2016) (finding, based on “the nature and breadth of the systemic phone restrictions” in immigration detention, a risk of affecting the outcome of removal proceedings).

B. The Departments' Proposed Rule Does Not Comport with the Due Process Clause.

While expanding the definition of frivolousness beyond logic, the Departments' Proposed Rules eliminate key procedural safeguards. The Departments' approach is truly perplexing. On the one hand, the Proposed Rules add a new *mens rea* of willful blindness, no longer requiring the asylum seeker's actual knowledge. On the other hand, the Departments foreclose the chance for IJs to hear the asylum seeker's account for discrepancies or implausible aspects of their claim—a necessary step to assess an asylum seeker's *mens rea*. In other words, AOs and IJs are to infer—not confirm—frivolousness. The rule would eliminate the current requirement that an IJ provide an additional opportunity to account for frivolousness issues before determining an application is frivolous, as long as the required notice is provided (merely turning in a signed application would meet the requirement for notice under the rule).

In their haste to overrule their own precedent in *Matter of Y-L-*, the Departments appear to forget the reasoning behind the current procedural safeguards. The respondent in *Y-L-* did not have an opportunity to explain the discrepancy at issue and had to petition to review her claim before the Second Circuit, which remanded the matter to the BIA precisely to protect asylum seekers' due process.⁴⁰ On its second review, the BIA reflected on the “severe consequences” of a finding of frivolousness that “forever bars” noncitizens from “any benefit” under the INA; this consideration provided the reasonable justification to grant asylum seekers the opportunity to account for discrepancies.⁴¹ Thirteen years later, the Departments seek to inflict these severe consequences on a drastically widened array of asylum seekers without any of these safeguards.

The Departments purport to provide an alternative “safety valve” that is even more concerning.⁴² Instead of allowing for the withdrawal or retraction of a frivolous claim without penalty, the Proposed Rules require that some applicants accept voluntary departure, withdraw with prejudice

⁴⁰ See *Liu v. U.S. Dep't of Justice*, 455 F.3d 106, 113 n.3 (2d 2006). Giving asylum seekers a meaningful opportunity to address an IJ's concerns is part of guaranteeing due process, and it is well-settled that the requirements of due process “are flexible and dependent on the circumstances of the particular situation examined.” *Id.* (quoting *Augustin v. Sava*, 735 F.2d 32, 37 (2d Cir. 1984)). This was not the first time either that federal courts had to remind IJs that summary findings of frivolousness can violate due process. See *Alexandrov v. Gonzales*, 442 F.3d 395, 407 (6th Cir. 2006) (concluding that an immigration court's reliance on hearsay to support a finding of frivolousness violated the asylum seeker's due process rights).

⁴¹ *Matter of Y-L-*, 24 I. & N. Dec. 151, 157-58 (BIA 2007).

⁴² 85 Fed. Reg. at 36264, 36277 n.25. The Departments also mischaracterize their proposal as a modification of *Matter of X-M-C-*, 25 I. & N. Dec. 322 (BIA 2010). In fact, *Matter of X-M-C-* affirmed the procedural safeguards of *Y-L-*, which the Departments have tossed here. *Matter of X-M-C-*, 25 I. & N. Dec. at 326 (“Furthermore, the warnings provided on asylum applications and verbally given by Immigration Judges, in addition to the safeguards outlined in *Matter of Y-L-*, 24 I. & N. Dec. 151, amply protect an asylum applicant and give the alien an opportunity to recant a statement or withdraw the application prior to acknowledging the frivolous application warnings. If after the warnings are given, the applicant still swears that the application is truthful, a subsequent withdrawal or a recanting of a story does not provide protection from a frivolous application inquiry or finding.”).

all other applications for relief, and waive any rights to file appeal, motion to reopen, or motion to reconsider. In other words, self-deportation—in lieu of explanation or recantation—is the only way to avoid a finding of frivolousness. This procedural “safety valve” makes a mockery of the ability to be heard guaranteed under the Due Process and betrays reckless disregard for asylum seekers’ lives.

C. The Proposed Rules’ Suggested Scheme Would Further Burden Backlogged Immigration Courts.

The Proposed Rules purport to improve efficiency and “root out” frivolous applications by offering AOs the opportunity to make findings of frivolousness.⁴³ The Departments appear to recognize that AOs would be tempted to deny claims wholesale based on frivolousness and disregard the asylum seeker’s full eligibility; this is presumably why the Departments do not permit AOs to refer or deny applications based solely on a finding of frivolousness. This precaution is wise given the extreme expansion of the definition this rule provides. However, the Departments do not exercise the same caution for IJs, who are permitted to deny an application based on frivolousness alone. It remains unclear why empowering AOs to make this finding would be a source of “deterrence” and an additional tool to root out applications, since asylum seekers are entitled to *de novo* review before the IJ. This new power could instead become a facile add-on for overworked AOs and prejudice an asylum seeker’s chances before the IJ to receive a full and fair hearing.

More importantly, the Departments are unlikely to achieve efficient adjudications in immigration courts. AOs’ frivolous findings are routed to IJs,⁴⁴ who have an even larger backlog.⁴⁵ Their ability to develop the record is thwarted by the Due Process concerns mentioned above, which means that they will likely view the expansion of the frivolousness definition as an administrative backdoor to lighten their docket and meet their increasing caseloads.

III. The Departments’ Proposed Expansion of Pretermission Raises Alarming Due Process Concerns.

The proposed expansion of IJs’ authority to pretermit and deny I-589 applications on the basis of “legal insufficiency” violates basic due process protections and unlawfully grants IJs the

⁴³ 85 Fed. Reg. at 36275.

⁴⁴ 85 Fed. Reg. at 36295 (to be codified at 8 C.F.R. § 208.20) (requiring “a final order by an immigration judge” or a finding the Board of Immigration Appeals for the frivolousness bar to apply)). The apparent exception would be cases where the noncitizen already has lawful status, in which case the Departments suggest that an AO could deny the application without a referral. *Id.* at 36274–75.

⁴⁵ See *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times*, TRAC Immigration, Oct. 25, 2019, <https://trac.syr.edu/immigration/reports/579/>.

authority to dismiss critical mixed questions of law and fact without an adequate and fair process for fact finding. Additionally, the Proposed Rules would cause irreparable harm to unrepresented and detained asylum seekers, whom these Proposed Rules consistently fail to consider.

A. *Expanding Pretermission Will Create Unfair, Inefficient, and Litigious Proceedings.*

Under the proposed rule, an IJ can deny an application for asylum, withholding of removal, or CAT relief if the IJ determines that the applicant has failed to establish a *prima facie* claim for relief under the applicable laws and regulations based solely on what is alleged in the I-589 application itself without hearing live testimony from the applicant or any supporting witnesses.⁴⁶ The IJ could deny *sua sponte* or based on a motion by DHS. The applicant would have only ten-days' notice prior to dismissal of his application to respond—hardly enough time to cure any defects and certainly no time for a full evidentiary asylum hearing. In other words, the Proposed Rule would deprive many applicants of the opportunity to fully supplement their I-589 application with evidence and live testimony through a typical asylum hearing.

The Departments argue that such an extension is permissible because current regulations require hearings only to resolve factual issues in dispute and not for legally deficient applications. However, the examples provided in the proposed rule itself demonstrate that the majority of issues or questions facing an IJ assessing an I-589 application are inherently mixed questions of fact and law that require credibility determinations and detailed fact finding allowed only in a full asylum hearing. The lack of an opportunity to present live testimony and witnesses to address these mixed questions of law and fact violates an applicant's right to Due Process.⁴⁷

The short, ten-day window to respond to an IJ's notice of likely pretermission is an insufficient cure to the lack of process since that time period still does not allow for full testimony and a hearing or adequate time to collect evidence. In light of the absence of an adequate EOIR electronic court filing system, many asylum applicants will not even have a full ten days to adequately respond as notice of the potential pretermission will take several days by mail to reach the applicant.

The proposed extension of IJ authority to preterm I-589 applications without an adequate hearing is also likely to have the unintended consequence of making asylum proceedings more litigious. Rather than move immediately from the filing of an application to a full adjudication

⁴⁶ 85 Fed. Reg. at 36277, 36302 (to be codified at 8 C.F.R. § 1208.13).

⁴⁷ See, e.g., *Colmenar v. INS*, 210 F.3d 967, 972 (9th Cir. 2000) (finding due process violation where IJ “rel[ie]d . . . almost exclusively on [the asylum seeker’s] written application to make his decision”); *Podio v. INS*, 153 F.3d 506, 510–11 (7th Cir. 1998) (finding due process violation where IJ “curtailed” asylum seekers testimony and barred corroboratory testimony.).

and hearing itself, DHS will now have an opportunity at an earlier stage to bring a motion for pretermission and IJs will have to adjudicate such motions and allow at least ten days for a response from the applicant. In other words, the extension adds an entirely new phase to the asylum litigation process—one similar to the motion to dismiss stage in civil court. Since IJs will only have authority to pretermit on legal grounds, some motions to pretermit could be denied, thereby only contributing to protracted adjudications.

B. The Extension of Pretermission Authority Disproportionately Harms Pro Se and Detained Asylum Seekers.

Typically, *pro se* and detained applicants file an initial I-589 application with very basic factual allegations and without adequate opportunity to collect corroborating factual evidence or other secondary research such as country conditions to support an application. *Pro se* individuals, particularly non-English speakers, may not even be aware of the full scope of evidence they can provide to supplement their application at the time of filing.⁴⁸ Similarly, those still seeking representation may file their application to meet the time requirements for filing while waiting for a lawyer to help them develop the facts and law in their claim. Detained applicants—even with counsel—usually need time to contact family on the outside or in other countries to support the legal claims included in their initial I-589 application.

In the current system, these applicants have time between the filing of their initial application and a full hearing to adequately prepare their own testimony, that of witnesses, and to collect factual and country conditions research to support the facts that give color to their legal claims for relief. Under the Proposed Rules, an IJ can terminate the entire application of such asylum seekers before they have time to fully assert their case for relief. The Proposed Rules adversely affect all asylum applicants, but disproportionately disadvantages those without counsel and those in detention.

IV. Rather Than Adding More Ambiguity to the PSG Test, the Departments Should Announce a Return to the *Acosta* Test.

The phrase “particular social group” is ambiguous. However, the justification for the proposed regulation—that courts have been unable to settle on a PSG definition that is workable—is misplaced. The test announced in *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), is clear and efficient. When the other asylum elements are allowed to do their work, the test is clear and easy to apply. These Proposed Rules seek to force PSG to do the work of all asylum

⁴⁸ NPR, *Without a Lawyer, Asylum-Seekers Struggle with Confusing Legal Processes* (Feb. 25, 2018), <https://www.npr.org/2018/02/25/588646667/without-a-lawyer-asylum-seekers-struggle-with-confusing-legal-processes>.

elements (persecution, nexus, discretion, criminal bars, etc.) and significantly overcomplicate the test in ways that will result in erroneous adjudications.

A. *The Proposed Rules regarding PSG are Unnecessary, Based on Improper Interpretations of Law, and Would Result in Erroneous Legal Conclusions.*

In a precedential decision issued in 1985, the BIA interpreted the phrase to mean a “group of persons all of whom share a common, immutable characteristic” that “the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”⁴⁹ The Board explained that the immutable characteristic “might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”⁵⁰

For approximately two decades, Circuit Courts of Appeal and the Board applied *Acosta*’s immutable characteristics test to determine whether proposed social groups were cognizable for asylum purposes. Then, between 2006 and 2008, the Board issued a series of decisions that introduced the concepts of “social visibility” and “particularity” into the analysis. The Board claimed “to adhere to the *Acosta* formulation,” and initially said that it would merely “consider[] as a relevant factor the extent to which members of a society perceive those with the characteristic in question as members of a social group.”⁵¹

Soon, though, the Board decided that “social visibility,” along with “particularity,” would be threshold requirements for a cognizable social group.⁵² *S-E-G-*, the Board’s lead case at the time, explained that to meet the social visibility requirement, an immutable characteristic “should generally be recognizable by others in the community,” such that “the members of the group are perceived as a group by society.”⁵³ The Board claimed that, despite the addition of these new requirements, it was “reaffirming the particular social group formula set forth in *Matter of Acosta*,”⁵⁴ and merely providing “greater specificity to the definition” from *Acosta*.⁵⁵ Notably, the Board’s cases during this period suggest that the addition of social visibility and particularity was driven by a concern about the number and breadth of social groups that had been put

⁴⁹ *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985), *overruled in part on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

⁵⁰ *Id.*

⁵¹ *Matter of C-A-*, 23 I. & N. Dec. 951, 956–57 (BIA 2006).

⁵² *See Matter of S-E-G-*, 24 I. & N. Dec. 579, 586 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 594–95 (BIA 2008) (companion case).

⁵³ 24 I. & N. Dec. at 586 (internal quotation marks omitted).

⁵⁴ *E-A-G-*, 24 I. & N. Dec. at 594.

⁵⁵ *S-E-G-*, 24 I. & N. Dec. at 581.

forward in asylum proceedings.⁵⁶

In 2009, the Seventh Circuit, in *Gatimi v. Holder*, rejected the social visibility requirement for the same reasons the Departments should now refrain from codifying through regulation the Board’s flawed PSG decisions.⁵⁷ *Gatimi* explained that social visibility “makes no sense.” *Id.* at 615, 616. Applying *Acosta*’s immutable characteristics test, the Court held that the proposed social group—defectors from a violent faction in Kenya—was cognizable despite no evidence that membership in the group “‘is of any concern to anyone in Kenya or that such individuals are seen as a segment of the population in any meaningful respect.’”⁵⁸

In 2013, the Seventh Circuit issued an *en banc* decision in *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013). Against the backdrop of the *S-E-G-* line of cases, *Cece* reiterated “[t]his Circuit has deferred to the Board’s *Acosta* formulation of social group,” and held that a proposed social group is cognizable if it “is defined by a characteristic that is either immutable or so fundamental to individual identity or conscience that a person ought not be required to change.”⁵⁹ The Court recognized that it had “rejected a social visibility analysis,”⁶⁰ and also refused to apply the Board’s particularity requirement because “breadth of category has never been a *per se* bar to protected status.”⁶¹ Applying only the immutable characteristics test, the Court held that the proposed group of “young Albanian women living alone” was cognizable.⁶²

The reasoning of the Seventh Circuit holds true today: the *Acosta* test is a clear and efficient way to discern asylum eligibility based on PSG. The proposed regulations add the same confusion and complexity the Seventh Circuit has rejected and should not be adopted now.

In 2014, the Board issued two published decisions that revisited the social visibility and particularity requirements.⁶³ The lead decision, *M-E-V-G-*, stated that the Board continued to “adhere to the social group requirements announced in *Matter of S-E-G-*” six years earlier.⁶⁴

⁵⁶ See, e.g., *id.* at 582, 585 (explaining that “Sal[]vadoran youths who have resisted gang recruitment” was not a cognizable group in part because it was a “potentially large and diffuse segment of society”); *E-A-G-*, 24 I. & N. Dec. at 595 (describing social visibility as a way to reject “statistical or actuarial groups” and “artificial group definitions”); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74, 76 (BIA 2007) (rejecting a proposed group that “could vary from as little as 1 percent to as much as 20 percent of the population, or more”).

⁵⁷ 578 F.3d 611 (7th Cir. 2009).

⁵⁸ *Id.* at 615.

⁵⁹ *Id.* at 669.

⁶⁰ *Id.* at 668 n.1.

⁶¹ *Id.* at 674, 676.

⁶² *Id.* at 677 (“In this case, the Board has offered no explanation for why *Cece*’s group is not cognizable under the test the Board has adopted in *Acosta*.”).

⁶³ See *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014).

⁶⁴ 26 I. & N. Dec. at 234.

Thus, *M-E-V-G-* restated *S-E-G-*'s three-part test for a cognizable social group: the group must be "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question."⁶⁵ *M-E-V-G-* did recognize that the term "social visibility" had given rise to a "misconception" that literal (or "ocular") visibility was required.⁶⁶ The Board explained that this "was never meant to be" the case, and "rename[d] the 'social visibility' requirement as 'social distinction'" to avoid further confusion.⁶⁷ Additionally, the Board repeatedly emphasized that this was a change in nomenclature only, and did not reflect any substantive differences in how the Board had previously used and intended the criterion.⁶⁸

1. Much like its precursor "social visibility," "social distinction" is a substantively unreasonable interpretation of PSG.

The social distinction requirement articulated and applied by the Board—and now proposed as a regulation—irrationally restricts the cognizability of social groups, including by setting near-insurmountable evidentiary burdens and requiring IJs to speculate about the "perception" of entire "societies." *Gatimi* explained that social visibility was unreasonable because:

If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population." Those former employees of the Colombian attorney general [from *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006)] tried hard, one can be sure, to become invisible and, so far as appears, were unknown to Colombian society as a whole.⁶⁹

So too with social distinction. Only groups that are "swimming against the stream of an embedded cultural norm,"⁷⁰ are likely to be "perceived within the given society as a sufficiently distinct group."⁷¹ Groups that can escape society's notice through secrecy will not qualify, even

⁶⁵ *Id.* at 237.

⁶⁶ *Id.* at 236.

⁶⁷ *Id.* at 236, 240.

⁶⁸ *See id.* at 247 ("Our transition to the term 'social distinction' is intended to clarify the requirements announced in those cases; it does not mark a departure from established principles."); *compare id.* at 240 ("Social distinction refers to social recognition To be socially distinct, a group . . . must be perceived as a group by society."), with *S-E-G-*, 24 I. & N. Dec. at 586 ("reaffirming the requirement that the shared characteristic of the group should generally be recognizable by others in the community").

⁶⁹ *Gatimi*, 578 F.3d at 615.

⁷⁰ *Cece*, 733 F.3d at 670.

⁷¹ *M-E-V-G-*, 26 I. & N. Dec. at 238.

if their defining characteristic would have social salience if society were aware of it. This is not a rational result and should not be furthered by codifying the Board’s post-*Acosta* PSG test by regulation.

Social distinction’s flaws run deeper still, as it requires IJs to make factual findings about the “perception[s]” of entire foreign societies.⁷² *M-E-V-G-* does not explain how this sociological judgment should (or even can) be rationally made in most cases. The Board suggested consulting “expert witness testimony,” “country condition reports,” “press accounts,” and “historical animosities,” as well as evaluating “sociopolitical or cultural conditions in the country.”⁷³ But it provided no explanation of what qualifies as sufficient “perception” by an entire society, or how to extrapolate “perception” from anything other than an expert opinion. *Id.* As a result, social distinction is an invitation for improper arm-chair theorizing by IJs.⁷⁴

In light of the above, AOs and IJs simply lack the expertise, training, and internal resources to make these types of social-science judgments in a rational and consistent manner.⁷⁵ By codifying social distinction, the Departments invite adjudicators to err and asylum seekers to suffer merely due to a vague and confusing interpretation.

Even assuming a consistent approach by AOs and IJs to the issue of societal perception, the same group could be recognized for one country but not another, or even in one case but not another from the same country, based only on differences in the presentation of evidence. Few asylum applicants—many of whom are *pro se* due to their limited financial means—can afford expert witnesses, or the presentation of curated country condition reports or press accounts. Social distinction thus effectively functions as a near *per se* bar to cognizability in many cases. It comes as no surprise that in the years since the Board first introduced the social-distinction component, it approved only *one* new PSG, relating to victims of domestic violence in Guatemala—a result driven by DHS’s decision, after years of political debate, to not contest the group’s cognizability.⁷⁶ And that decision was overturned by the Attorney General for lacking the evidentiary rigor necessary to pass this insurmountable test.

⁷² See, e.g., *M-E-V-G-*, 26 I. & N. Dec. at 240, 242.

⁷³ *Id.* at 240–42, 244.

⁷⁴ Cf. *Torres*, 551 F.3d at 632 (criticizing an IJ for having “improperly relied on his own assumptions about the Honduran military . . . to reach his decision”).

⁷⁵ Cf. *Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006) (noting that the immigration system “requires entirely too much of a lawyer who should be a neutral adjudicator rather than a rulemaker and expert rolled together,” and that IJs are “poorly suited” to “play the role of country specialist”).

⁷⁶ See *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 393–95 (BIA 2014) (emphasizing that this decision was limited to its facts, and that other cases “will depend on the facts and evidence” in those cases) (overturned by *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018)).

A test that can never be passed ceases to serve a useful function in asylum adjudication and, rather, becomes a bar that overrides the intent of Congress to permit some applicants to receive protection based on PSG membership. The Departments would err by incorporating this insurmountable—and thus unlawful—test into regulation.

2. The Departments should not codify “particularity” either, which suffers the same opacity as its companion, “social distinction.”

NIJC urges the Departments to announce a clear return to the *Acosta* test. As the Seventh Circuit has noted, adding requirements is not necessary to provide reasonable limits on eligibility for asylum; the “on account of” requirement well serves that function.⁷⁷ Other circuits found the particularity and social visibility standards opaque and difficult to understand and they remain so today. The Third Circuit, for example, observed that even government attorneys appeared flummoxed by the concepts, and the court itself was “hardpressed to discern any difference between the requirement of ‘particularity’ and. . . ‘social visibility.’ . . . [T]hey appear to be different articulations of the same concept and the government’s attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating.”⁷⁸ Similarly, the Ninth Circuit noted that the BIA had “blended the ‘social visibility’ and “‘particularity’ analysis,” and, as a result, it was “difficult to articulate precisely what the BIA meant by ‘social visibility.’”⁷⁹

Indeed, DHS itself appeared to see no difference between the two concepts; in *Matter of M-E-V-G-*, DHS proposed combining particularity and social visibility into a single requirement.⁸⁰ The companion BIA cases of *Matter of W-G-R-* and *Matter of M-E-V-G* did nothing to resolve this confusion. Those cases simply renamed “social visibility” as “social distinction.”⁸¹ The level of confusion surrounding social distinction since its inception illustrates the fundamental problem with it as a PSG factor and this problem should not be compounded by incorporating it into a regulation.

In addition, the meaning of “particularity” remains unclear. The BIA insists that the “particularity” requirement is necessary to ensure that a proposed group is “discrete” and has

⁷⁷ See *Cece*, 733 F.3d at 673–74 (“Those who fear that the slope leading to asylum has been made too slick by broad categories need not worry” because “[t]he importance of the ‘on account of’ language must not be overlooked.”).

⁷⁸ *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 663 F.3d 582, 608 (3d Cir. 2011) (rejecting social visibility). The Third Circuit subsequently accorded *Chevron* deference to the BIA’s revised “social distinction” requirement. *S.E.R.L. v. Attorney Gen. of U.S.*, 894 F.3d 535, 540 (3d Cir. 2018).

⁷⁹ *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1088, 1090-91 (9th Cir. 2013).

⁸⁰ 26 I. & N. Dec. at 233.

⁸¹ *Matter of W-G-R-*, 26 I. & N. Dec. at 216.

“definable boundaries.”⁸² The BIA, however, often uses the particularity requirement to reject groups that have clear boundaries solely because it considers the group too broad.⁸³ For example, in *W-G-R-*, the BIA explained that “[i]n Canada or the United States,” a group comprising “landowners” would be “far too amorphous” to meet the particularity requirement.⁸⁴ The BIA’s reasoning is hard to understand, because the boundaries of that hypothetical group are obvious—individuals who own real property.⁸⁵

Moreover, the BIA provided an equally confusing rationale for rejecting the proposed social group at issue in *W-G-R-*, “former members of the Mara 18 gang in El Salvador who have renounced their gang membership.”⁸⁶ The BIA concluded that the group failed the particularity requirement because it “could include persons of any age, sex, or background,” *id.*, even though plain boundaries delineate that group from citizens who have never joined a gang or continue to be part of a gang.⁸⁷

The BIA has never adequately defined the concepts of “particularity” and “social distinction.” Instead, the definition of those concepts appears to shift from case to case, depending on the result the BIA wishes to reach. The consequence is a series of conflicting pronouncements that leave the concepts of particularity and social distinction far from clear. These inherently problematic and unsalvageable terms should not be imported into new asylum regulations issued by the Departments—particularly as the Board provided a clear, logical interpretation in *Acosta* 25 years prior.

B. The Stated Justifications for Listing Unviable PSGs are hollow and unsupported by law.

The Departments’ proposed list of groups that are *per se* not PSGs unlawfully reads PSG out of the statute and improperly conflates the asylum elements. The INA grants IJs the responsibility to “determine” whether an asylum applicant has met her burden.⁸⁸ Moreover, by regulation, the BIA members “shall exercise their independent judgment and discretion” in deciding cases,

⁸² *Matter of M-E-V-G-*, 26 I. & N. Dec at 239.

⁸³ *Matter of W-G-R-*, 26 I. & N. Dec. at 215, 221.

⁸⁴ *Id.* at 214-15.

⁸⁵ See *N.L.A.*, 744 F.3d at 438 (BIA erred by rejecting social group of landowners because the group was “too broad, too amorphous and unspecific”).

⁸⁶ *Matter of W-G-R-*, 26 I. & N. Dec. at 221.

⁸⁷ *Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (finding that group comprising former gang members is “neither unspecific nor amorphous”).

⁸⁸ 8 U.S.C. § 1229a(c)(4)(B).

subject to the Attorney General’s legal rulings.⁸⁹ The Departments cannot, by regulation, issue blanket orders indicating whole classes of people are not eligible for asylum and order the BIA and IJs not to exercise their discretion and judgment in a given case. If these regulations have the aim of telling the BIA and IJs what to do, they would be attempting “precisely what the regulations forbid him to do: dictating the Board’s decision.”⁹⁰ Nor is it required that an explicit order be given for the Departments to violate the *Accardi* principle: “[i]t would be naive to expect such a heavy-handed way of doing things.”⁹¹ As such, the list of non-viable PSGs set forth in the proposed regulations is improper and should not be codified. Moreover, the list is nonsensical in light of the asylum statute and the interactions of the various elements.

1. Past or present criminal activity or associations may form the basis of a PSG in some cases.

First, contrary to the proposed regulation, past or present criminal activity or associations may form the basis of a PSG in some cases. The Seventh Circuit has held the same and found Congressional intent supports that notion. In response to the assertion that former gang members could not form a PSG, the court observed:

That is not Congress’s view. It has barred from seeking asylum or withholding of removal any person who faces persecution for having himself been a persecutor (a Nazi war criminal, for example) or who has committed a “serious nonpolitical crime.” But it has said nothing about barring former gang members[.]⁹²

The Court continued, “Such an extension might be thought perverse in a case like this. [The former gang member] would not have quit the gang had he thought he’d be sent back to El Salvador, and if he is sent back his only hope of survival (assuming that his fear of persecution is well founded, an issue not before us) will be to abandon his Christian scruples and rejoin the gang.”⁹³

The Seventh Circuit is not alone in this analysis. In *Martinez v. Holder*, the Fourth Circuit rejected DHS’ contention that antisocial or criminal conduct is pertinent to the PSG analysis, because doing so would be “untenable as a matter of statutory interpretation and logic.”⁹⁴ The court went on to find that former gang members met the keystone *Acosta* requirement—and the

⁸⁹ 8 C.F.R. § 1003.1(d)(1)(ii).

⁹⁰ *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).

⁹¹ *Id.*

⁹² *Benitez Ramos v. Holder*, 589 F.3d 426, 429–30 (7th Cir. 2009) (internal citations omitted).

⁹³ *Id.* at 430.

⁹⁴ *Martinez v. Holder*, 740 F.3d 902, 911-12 (4th Cir. 2016).

sole the Departments should codify, as stated prior. The proposed regulation is not good law or policy, creates confusion by seeming to duplicate existing statutory bars to asylum, and violates Congressional intent. As such, it should not be adopted.

2. Past or present terrorist or persecutory activity or association is already a bar to asylum and using the PSG definition to bar claims where that is a factor is improper and confusing.

Likewise, the Departments propose that past or present terrorist or persecutory activity or association not form the basis of a PSG, but, as noted above, that activity already bars asylum. This proposed exclusion is not only duplicative of a different portion of the INA; it is also an improper and confusing injection into the PSG analysis.

3. There is no need to issue a regulation stating that presence in a country with generalized violence or a high crime rate is not a PSG since that characteristic would speak to well-founded fear, nexus, and government willingness or ability to protect asylum seekers.

Similarly, the Departments are misguided in issuing a regulation stating that presence in a country with generalized violence or a high crime rate is not a PSG. That characteristic would speak to well-founded fear, nexus, and government unwilling/unable to control elements. Seeking to limit such claims at the PSG prong will result in confused and redundant adjudications. This ever-growing list of duplicative and ill-founded exclusions poses serious questions as to the Departments' understanding of the statutory framework in the INA.

4. The remaining exclusions from the proposed PSG definition interfere with adjudicators' sound application of the INA.

There is no legal reason based in the statute that the attempted recruitment of an asylum seeker by criminal, terrorist or persecutory groups, perceptions of wealth, or the characteristic of returning from the United States⁹⁵ may not form the basis of a PSG in some cases. Attempting to issue a blanket rule suggesting they cannot prevail is an *Accardi* violation. IJs should be instructed to faithfully apply the elements of asylum in order to determine whether applicants making those claims will prevail. Many will not because they will fail to meet other grounds. Using PSG to pre-empt these claims is improper and violates the statute.

⁹⁵ The Departments provide no justification to exclude asylum seekers who are deported to their home country, despite extensive evidence that many suffer persecutory acts, including murder, upon return. See Kevin Sieff, *When Death Awaits Deported Asylum Seekers*, WASHINGTON POST (Dec. 26, 2018) <https://www.washingtonpost.com/graphics/2018/world/when-death-awaits-deported-asylum-seekers/>.

Finally, delineating “interpersonal disputes” and “private criminal acts” as ineligible to form the basis of a PSG is also improper. An interpersonal dispute or private criminal act may or may not suffice to establish a government is unwilling or unable to control persecution against an asylum seeker. And it may be that in those circumstances internal relocation could alleviate the threat of future harm. These are individualized inquiries that must take place on a case-by-base basis and under separate elements of the asylum statute; dooming these claims under the PSG element is nonsensical and will lead to rushed and faulty adjudications.

C. The Departments Seek to Penalize Asylum Seekers Who Fail to Navigate the Opaque and Illogical Requirements for PSG Definitions.

The Proposed Rules state: “A failure to define, or provide a basis for defining, a formulation of a PSG before an IJ shall waive any such claim for all purposes under the Act, including on appeal, and any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel.”⁹⁶ Here, the government wants to have it both ways, regardless of how one defines a PSG, adjudicators are to look to the “substance of the group” to determine whether it is cognizable.⁹⁷ But, under the proposed regulations, failing to precisely define the group also results in denial. This is a “heads I win, tails you lose” situation. An approach more faithful to the statute is the one recognized by Seventh Circuit. Observing that several versions of the posited group had emerged through the course of a case, the court said:

Both the parties and the immigration courts were inconsistent, and the description of her social group varied from one iteration to the next. The inconsistencies, however, do not upset the claim. *See In re Kasinga, 21 I. & N. Dec. 357* (BIA 1996) (the Board, recognizing that both the Immigration and Naturalization Service and the applicant “advanced several formulations of the ‘particular social group’ at issue”). And in one form or another, both [the asylum seeker] and the IJ articulated the parameters of the relevant social group.⁹⁸

It is appropriate for adjudicators to identify the PSG presented in a case by its core, even if the exact language shifts throughout litigation. Asylum law is not supposed to be a “gotcha” proposition, where missing one word or adding another is the difference between protection and return to peril.

⁹⁶ 85 Fed. Reg. at 36291, 36300 (to be codified at 8 C.F.R. §§ 208.1, 1208.1.)

⁹⁷ 85 Fed. Reg. at 36279 (“[T]he substance of the alleged particular social group, rather than the specific form of its delineation, will be considered by adjudicators in determining whether the group falls within one of the categories on the list.”).

⁹⁸ *Cece v. Holder*, 733 F.3d 662, 670 (7th Cir. 2013).

As stated in prior sections, this proposed change would adversely affect *pro se*, detained, and indigent asylum seekers who cannot afford the sophisticated PSG analysis of counsel, and many may fall prey to ineffective attorneys whose incompetent representation prejudices their claims. Congress recognized the unique vulnerability of noncitizens when it tasked IJs with developing the record,⁹⁹ as did the BIA.¹⁰⁰ Nevertheless, the Departments seek to penalize asylum seekers, preclude the Due Process protections provided by appeals, motions to reconsider, and the safeguards of ineffective assistance of counsel. This blatant disregard for asylum seekers' constitutional and statutory rights cannot constitute reasonable rulemaking.

V. The Departments Propose a Retrogressive Definition of “Political Opinion” in Direct Conflict with United Nations High Commissioner for Refugees (UNHCR) Guidance, U.S. Jurisprudence, and Today’s Geopolitical Reality.

The scholar Catherine Dauvergne has noted that the prong of the refugee definition that protects persecution on the basis of one’s political opinion “comes closest to the Cold War roots of refugee jurisprudence and most directly reflects the trope of the political refugee.”¹⁰¹ The term “political opinion” was not explicitly defined in the Refugee Convention, but the working papers from the Convention reveal an intent to define the term expansively.¹⁰² In the decades since, the United Nations has led the development of a consensus understanding that the term must be defined with a flexibility that accounts for an individualized consideration of political context and circumstance. This flexibility is key to giving the term meaning in today’s complex global reality. Yet the Proposed Rules seek to upend this consensus.

A. *The Proposed Rules Require “Political Opinion” to Relate to State Control, Contrary to UNHCR Guidance and Common Sense.*

Black’s Law Dictionary defines “political” as follows: “Of, relating to, or involving politics; pertaining to the conduct of government.”¹⁰³ This bifurcated definition explicates what is common sense to most: the term “political” pertains to the conduct of government and governing parties, but it also pertains to “politics”—a broad array of ideas and discourse in the public space.

⁹⁹ 8 U.S.C. § 1229a(b)(1).

¹⁰⁰ *Matter of E-F-H-L-*, 26 I. & N. Dec. 319, 322 (BIA 2014) *vacated on other grounds* in *Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (U.S. Atty Gen. 2018).

¹⁰¹ Catherine Dauvergne, *Toward a New Framework for Understanding Political Opinion*, 37 MICH. J. INT’L L. 243, 245 (2016), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1092&context=mjil>.

¹⁰² *Id.*

¹⁰³ *Political*, Black’s Law Dictionary (11th ed. 2019).

Merriam-Webster, in turn, defines “politics” as encompassing not only the “art or science of government” but “the total complex of relations between people living in society.”¹⁰⁴

Removing any lingering ambiguity as to whether this common sense use of the word “political” should be read into the Refugee Convention, UNHCR has laid down clear guidance on the question—guidance that the Departments appear not to have read. In its 2002 Guidelines on Gender-Related Persecution, UNHCR stated: “Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.”¹⁰⁵ UNHCR reiterated the same definition in a 2010 Guidance Note.¹⁰⁶ UNHCR’s definition is similar to that proposed by scholar Guy Goodwin-Gill and adopted by the Supreme Court of Canada in 1993, which defines political opinion to include “any opinion on any matter in which the machinery of State, government, and policy may be engaged.”¹⁰⁷

Yet the Departments propose in these Rules to upend this consensus and instead advance a dangerously narrow definition of “political opinion” that is both contrary to law and modernity. The Rules propose to redefine “political opinion” as “an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof.”¹⁰⁸ To students of this administration’s approach to asylum law and policy, it is clear that this redefinition is a naked attempt to cripple the United States asylum system by shutting off asylum access for women, survivors of gender-based harm, and victims of gang violence.¹⁰⁹ The Proposed Rules’ authors, however, clumsily argue that their reasoning is in fact rooted both in Board of Immigration Appeals precedent and in UNHCR guidance. But they are wrong. The Proposed Rules cite two sources for their justification, and *incorrectly describe the significance and findings* of both.

¹⁰⁴ *Politics*, Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/politics>.

¹⁰⁵ United Nations High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (May 2002), para. 32, <https://www.refworld.org/pdfid/3d36f1c64.pdf>.

¹⁰⁶ United Nations High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (March 2010, para. 45, (Mar. 31, 2010).

¹⁰⁷ *Ward v. Canada (Attorney General)*, [1993] 2 S.C.R. 689, 746 (Can.), <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1023/index.do>. The European Union’s Qualification Directive setting forth standards for international protection similarly defines political opinion as broadly connected to the “potential actors of persecution,” including state actors and non-state actors the state is unable or unwilling to control. Council Directive 2011/95/EU, art. 10(1)(e), 2011 O.J. (L 337) 9, 16.

¹⁰⁸ 85 Fed. Reg. at 36280.

¹⁰⁹ See, e.g., Katie Benner and Caitlin Dickerson, *Sessions says domestic and gang violence are not grounds for asylum*, N.Y. Times, June 11, 2018, <https://www.nytimes.com/2018/06/11/us/politics/sessions-domestic-violence-asylum.html>.

First: The Proposed Rules cite *Matter of S-P-* as support for the statement that “BIA case law makes clear that a political opinion involves a cause against a state or a political entity rather than against a culture.”¹¹⁰ This is a misreading of *S-P-*, in which the Board required an applicant to demonstrate that his political views “were antithetical to those of the government” in order to make out a political opinion claim.¹¹¹ Requiring that an opinion be “antithetical to those of the government” *in no way* supports the notion that such opinion must be directly related to political or state control. In the United States, for example, one might argue that a person’s political opinion against a woman’s right to abortion is antithetical to the government’s views (as espoused by Supreme Court jurisprudence); such an opinion, however, has little to do with the state’s political controls.

Second: The Proposed Rules cite the 2019 UNHCR Handbook for the same proposition,¹¹² but this analysis is even more blatantly misleading. The Handbook, in fact, merely notes that “political opinion” must entail “[h]olding political opinions *different* from those of the Government.”¹¹³

B. The Proposed “Political Opinion” Definition is Another Blatant Attempt to Block Those Fleeing Violence from Non-state Actors From Asylum.

Going even further, the Departments propose that the definition of political opinion be *explicitly defined* to almost categorically exclude those fleeing gang-related violence and other harms by non-state actors. Toward this end, the Rules propose that immigration adjudicators be admonished against the favorable adjudication of asylum claims brought by those fleeing persecution on account of a political opinion “defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior that is antithetical to or otherwise opposes the ruling legal entity of the state or a legal sub-unit of the state.”¹¹⁴

These specific instructions clash directly with UNHCR guidance. In 2010, UNHCR issued a Guidance Note on gang-related refugee claims, explicitly affirming that a wide variety of

¹¹⁰ 85 Fed. Reg. at 36279.

¹¹¹ *Matter of S-P-*, 21 I. & N. Dec. 486, 494 (BIA 1996).

¹¹² 85 Fed. Reg. at 36279.

¹¹³ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, ch. II(B)(3)(f), Paras. 80–82 (Feb. 2019).

¹¹⁴ *Id.*

opinions and beliefs running contrary to organized criminal networks could constitute a valid “political opinion” in the context of the refugee definition.¹¹⁵ The Note states:

Gang-related refugee claims may also be analysed on the basis of the applicant’s actual or imputed political opinion vis-à-vis gangs, and/or the State’s policies towards gangs or other segments of society that target gangs (e.g. vigilante groups)... It is important to consider, especially in the context of Central America, that powerful gangs, such as the Maras, may directly control society and de facto exercise power in the areas where they operate. The activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities. Such cases, thus, may under certain circumstances be properly analysed within the political opinion Convention ground... Where an applicant has refused the advances of a gang because s/he is politically or ideologically opposed to the practices of gangs and the gang is aware of his/her opposition, s/he may be considered to have been targeted because of his/her political opinion.¹¹⁶

Similarly, in 2010, UNHCR issued guidance explicitly stating that gender-based claims may be brought on the basis of political opinion grounds. The guidance notes that claims for refugee status “based on transgression of social or religious norms may be analyzed “under numerous protected grounds, including political opinion. Political opinion is noted to “include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her.”¹¹⁷

The proposed definition of “political opinion” would not only put the United States’ asylum policy in direct contravention of UNHCR guidance, it would also eviscerate decades of thoughtful jurisprudence across numerous circuit courts of appeals that have followed UNHCR’s guidance.¹¹⁸

¹¹⁵ United Nations High Commissioner for Refugees, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (March 2010, paras. 45-49, (Mar. 31, 2010).

¹¹⁶ *Id.*

¹¹⁷ UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (May 2002), para. 23, <https://www.refworld.org/pdfid/3d36f1c64.pdf>.

¹¹⁸ See, e.g., *Hernandez-Chacon v. Barr*, 948 F.3d 94, 103 (2d Cir. 2020) (“But this Circuit has held that the analysis of what constitutes political expression for these purposes involves a complex and contextual factual inquiry into the nature of the asylum applicant’s activities in relation to the political context in which the dispute took place.”) (quotations omitted); *Alvarez Lagos v. Barr*, 927 F.3d 236, 251 (4th Cir. 2019) (finding imputed anti-gang opinion constitutes political opinion); *Espinosa-Cortez v. Attorney General of the U.S.*, 607 F.3d 101, 108-112 (3d Cir. 2010) (finding valid imputed political opinion claim where guerrilla organization threatened applicant, who had close ties to the Colombian government, into becoming an informant); *Martinez-Buendia v. Holder*, 616 F.3d 711, 716-718 (7th Cir. 2010).

The Proposed Rules are retrogressive, yanking the United States back in time decades and reversing significant progress toward an asylum jurisprudence that is reflective of the real world. In today's reality, non-state actors often have significant control over neighborhoods, state actors are often unable or unwilling to intervene, and the geopolitical landscape often renders distinctions between opposition to the state and views regarding culture meaningless.¹¹⁹ The proposed redefinition of "political opinion" will set up a harmful framework that determines whether someone is eligible for protection based on the strength of the state regime in the country they have fled. Those fleeing persecution from non-state actors in countries with less functional governments that are unable or unwilling to protect them will be almost entirely shut out of protection.

The results, like most parts of this Rule, will spell death and harm for many. Consider, for example, Rosario Del Carmen Hernandez-Chacon, a young mother who survived two violent sexual assaults by gang members in El Salvador.¹²⁰ When she returned home from the hospital after the second assault, she found a note under her door from the men who had attacked her, warning they would kidnap her daughter and rape her and kill her if she went to the police.¹²¹ Ms. Hernandez-Chacon sought safety and asylum in the United States. The Second Circuit determined that she could make out a viable claim based on her political opinion: "her opposition to the male-dominated social norms in El Salvador and her stance against a culture that perpetuates female subordination and the brutal treatment of women."¹²² The record in Ms. Hernandez-Chacon's case included evidence that El Salvador has the highest femicide rate in the world, with laws against rape "not effectively enforced."¹²³

Had these Proposed Rules been in effect when Ms. Hernandez-Chacon made it to the U.S. border, she would have been denied asylum and returned to El Salvador to her death.

VI. The Proposed Rules Raise the Standard for Establishing Persecution Above Anything Contemplated by Congress and Improperly Conflate Persecution with Other, Separate Asylum Elements.

The Proposed Rules attempt to restrict asylum eligibility by establishing, for the first time ever, a regulatory definition of "persecution." Under the new definition, "persecution requires an intent

¹¹⁹ See, e.g., *Life Under Gang Rule in El Salvador*, International Crisis Group (November 2018), <https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/life-under-gang-rule-el-salvador>.

¹²⁰ *Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. 2020).

¹²¹ *Id.* at 98-99.

¹²² *Id.* at 102.

¹²³ *Id.* at 99-100.

to target a belief or characteristic, a severe level of harm, and the infliction of a severe level of harm by the government of a country or by persons or an organization the government was unable or unwilling to control.”¹²⁴ The Proposed Rules further define persecution as needing to include “actions so severe that they constitute an exigent threat,” but not including “generalized harm that arises out of civil, criminal or military strife . . . intermittent harassment, including brief detentions; threats with no actual effort to carry out the threats; of non-severe economic harm or property damage.”¹²⁵ Finally, the Proposed Rules assert that “the existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.”¹²⁶

The Departments’ new definition interferes with two foundational premises of asylum adjudications: fact-specific reviews and the assessment of cumulative harm. Additionally, this new definition fails to account for credible threats of serious harm, which are long-recognized forms of persecution under the asylum statute. Lastly, the Departments’ new definition attempts to improperly apply CAT-level harm assessment to asylum seekers, whose threshold is distinctly lower, while conflating persecution with unrelated elements in asylum law.

A. The Departments Provide No Reasonable Justification for Their Overly Restrictive Definition.

This is a dramatic shift from the way persecution has been interpreted and understood over the past four decades. At present, the term “persecution” is not defined in the statute or regulations. As a result, over time, the U.S. Courts of Appeals have given shape to the definition of persecution through case-by-case adjudications and this has been critical to ensure that the United States provides protection to legitimate refugees consistent with our domestic and international obligations. If the term is defined too narrowly or rigidly, it risks leaving refugees without protection. In contrast, a flexible definition ensures that asylum protection remains available as new forms of harm arise, recognizing “the inventiveness of humanity to think up new ways of persecuting fellow men.”¹²⁷

An elastic concept of persecution is also necessary to keep the definition of persecution consistent with an evolving understanding of what causes and can constitute harm. For example, in 2008, the U.S. Court of Appeals for the Seventh Circuit overturned an IJ’s determination that an asylum seeker had not suffered harm rising to the level of persecution, in large part because

¹²⁴ 85 Fed. Reg. at 36291; 36300.

¹²⁵ *Id.* at 36291-92.

¹²⁶ *Id.* at 36292.

¹²⁷ *Atle Grahl-Madsen*, 1 *The Status of Refugees in International Law*, 193 (1966).

the Court found the judge had failed to fully consider the asylum seeker's young age and childhood sexual abuse, noting that this type of harm has been recognized as causing "harmful, long-term effects."¹²⁸

The proposed rules assert the need for a regulatory definition of persecution "[g]iven the wide range of cases interpreting "persecution" for the purposes of the asylum laws".¹²⁹ That merely asserts a fact, not an explanation. Asylum cases are inherently fact-specific and no part of an asylum claim is more individualized than the specific way in which one person harmed another. By establishing a strict, regulatory definition of persecution, the Proposed Rules significantly undercut the necessary flexibility of the current framework and this will ultimately result in the erroneous denial of protection to asylum seekers. The Proposed Rules provide no rationale for such a significant departure from the current manner of interpreting this term.

B. Attempting to Regulate Which Levels and Forms of Harm Constitute Persecution Ignores the Longstanding Rule that Harm Must Be Analyzed Cumulatively.

It is well-established in asylum law that in determining whether an asylum seeker suffered past persecution, adjudicators must examine all harm cumulatively.¹³⁰ The definition of persecution in the Proposed Rules creates a standard that at worst, directly conflicts with this principle, and at best, will result in significant confusion and erroneous decision-making by adjudicators. The Proposed Rules assert that persecution "does not include intermittent harassment including brief detentions; threats with no actual effort to carry out the threats; or, non-severe economic harm or property damage."¹³¹ In some cases, it may be true that "intermittent harassment" or "brief detentions" would not, on their own, rise to the level of persecution. But considered cumulatively with other harm, they very well could constitute persecution. Asserting that these forms of harm are not "include[d]" in the definition of persecution incorrectly misstates how persecution is examined and makes it likely that in the future, adjudicators who are determining whether an asylum seeker suffered persecution will erroneously disregard these forms of harm all together, rather than considering them as part of a cumulative analysis.

¹²⁸ *Kholyavskiy v. Mukasey*, 540 F.3d 555, 570 (7th Cir. 2008).

¹²⁹ 85 Fed. Reg. at 36280.

¹³⁰ See *Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009) ("[D]etention is one of many incidents that in the aggregate constitute persecution."); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1036 (8th Cir. 2008) ("In some cases, an applicant may be able to show a well-founded fear of persecution on cumulative grounds) (internal citation omitted); *Poradisova v. Gonzales*, 420 F.3d 70, 79-80 (2d Cir. 2005); *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) ("The key question is whether, looking at the cumulative effect of all the incidents a petitioner has suffered, the treatment she received rises to the level of persecution."); *Matter of O-Z- & I-Z*, 22 I. & N. Dec. 23, 26 (BIA 1998) ("We find that these incidents constitute more than mere discrimination and harassment. In the aggregate, they rise to the level of persecution."); see also UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 201 (Geneva 1992) ("The cumulative effect of the applicant's experience must be taken into account.").

¹³¹ 85 Fed. Reg. at 36291-92.

The Proposed Rules' prohibition on considering "brief detentions" as persecution is a clear example of the erroneous adjudications that will result from this new regulatory definition of persecution. This exact situation arose in the case of *Baharon v. Holder*, 588 F.3d 228 (4th Cir. 2009), in which a Yemeni man sought asylum after he was subject to repeated discrimination, arrested and detained for three days during which he was subject to violent interrogation, his brother and uncle were severely beaten, and he was subjected to ongoing governmental surveillance. The IJ denied asylum, finding that the petitioner's three-day detention did not constitute persecution, but the Fourth Circuit reversed. The Court found that the Judge and BIA:

[E]rrred by reducing Baharon's treatment to a single, three-day detention. . . . Not only did Yemeni policy detain and beat Baharon . . . causing "excruciating" pain, but they threatened that he would "disappear. . . . [T]he threat of disappearance . . . was made all the more likely by the uncle's own disappearance."¹³²

The Court further noted that although the BIA in Baharon's case had asserted that courts "have been reluctant to categorize detentions unaccompanied by severe physical abuse or torture as persecution,"¹³³ that concern did not apply here where "detention is one of many incidents that in the aggregate constitute persecution."¹³⁴

Under the Proposed Rules, adjudicators are likely to determine that asylum seekers like Mr. Baharon, who have been detained for relatively short periods of time, have not been subjected to past persecution, even where the asylum seeker experienced significant harm or abuse while detained or even if the detention was one incident among many forms of harm inflicted her. The Proposed Rules again provide no explanation for this significant change in interpretation or for the confusion that will likely result.

C. Credible Threats of Serious Harm Have Long Been Recognized as Persecution and the Departments' Attempts to Eliminate this Basis is Inconsistent with the Statute.

The proposed rules attempt to restrict asylum eligibility by prohibiting "threats with no actual effort to carry out the threats" from being considered persecution. As with the change discussed in the prior section, this new definition diverges substantially from established case law and will lead to more confused and erroneous adjudications.

¹³² *Baharon*, 588 F.3d at 232.

¹³³ *Id.* (internal citation omitted).

¹³⁴ *Id.*

First, as noted above, it is well-established that harm must be analyzed cumulatively when determining whether it rises to the level of persecution. Even where an individual threat may not rise to the level of persecution, adjudicators must consider that threat when determining if, in the aggregate, the asylum seeker has suffered harm rising to the level of persecution. Specifically prohibiting certain threats from being considered persecution leaves unclear whether those threats could be considered as part of the cumulative analysis—which they can and should—and will lead to erroneous decision-making that ignores threats all together during the persecution analysis.

Second, the Proposed Rules incorrectly assert that “courts have been inconsistent in their treatment of threats as persecution.”¹³⁵ The standard for determining whether threats constitute persecution does not differ significantly from jurisdiction to jurisdiction. Instead, nearly every court has consistently held that threats can rise to the level of persecution when accompanied by some evidence that the threat is serious and credible, meaning the perpetrator is likely to follow through on the threat.¹³⁶

In support of its claim that courts have inconsistently analyzed whether threats constitute persecution and thus, a new rule is necessary, the Proposed Rules cite decisions from the First, Second, Third, Ninth, and Seventh Circuits, alleging that these circuits have held that threats generally don’t constitute persecution, and cases from the Fourth Circuit, alleging that this court has held that threats do constitute persecution.¹³⁷ These cases do not stand for the points the Departments claim they do.

For example, the Proposed Rules cite *Li v. Att’y Gen.*, 400 F.3d 157 (3d Cir. 2005) for the point that threats are not persecution. Recently, however, the Third Circuit clarified that the question

¹³⁵ 85 Fed. Reg. at 36281.

¹³⁶ Most courts use the terms “imminent,” “credible,” “serious,” and/or “menacing” to describe the kinds of threats that constitute persecution. *See, e.g., Cedillos-Cedillos v. Barr*, 2020 WL 3476981 *2 (4th Cir., June 26, 2020) (“[T]he IJ recognized this circuit’s determination . . . that credible death threats can amount to persecution.”); *Scarlett v. Barr*, 957 F.3d 316, 328 (9th Cir. 2020) (To rise to the level of persecution, a threat must be “so imminent or concrete . . . or so menacing as itself to cause actual suffering or harm.”) (internal citations omitted); *Juan Antonio v. Barr*, 959 F.3d 778, 793 (6th Cir. 2020) (“[T]hreats alone are only sufficient [to establish persecution] when they are of a most immediate and menacing nature.”) (internal citations omitted); *N.L.A. v. Holder*, 744 F.3d 425, 431 (7th Cir. 2014) (“This court has declared, however, that credible threats of imminent death or grave physical harm can indeed be sufficient to amount to past persecution, provided they are credible, imminent and severe.”); *Javed v. Holder*, 715 F.3d 391, 395-96 (1st Cir. 2013) (“[C]redible, specific threats can amount to persecution if they are severe enough.”); *Chavarría v. Gonzalez*, 446 F.3d 508, 518 (3d Cir. 2006) (“We have further defined acceptable threats [constituting persecution] to include only those that are highly imminent and menacing in nature.”); *Corado v. Ashcroft*, 384 F.3d 945, 947 (8th Cir. 2004) (“We have never held that a specific, credible, and immediate threat of death . . . is outside the definition of ‘persecution,’ just because it occurs during a single incident.”); *Vatulev v. Ashcroft*, 354 F.3d 1207 (10th Cir. 2003) (“Only rarely, when they are so immediate and menacing as to cause significant suffering or harm do threats per se qualify as persecution.”).

¹³⁷ 85 Fed. Reg. at 36281.

of whether a threat is sufficiently “concrete and menacing,” which includes being imminent, does not turn on whether the threat was fulfilled.¹³⁸ Instead, it is determined within the context of the applicant’s cumulative experience and whether the threat was a “severe affront” to the applicant’s “life or freedom.”¹³⁹ Thus, said the Third Circuit, the threats in *Li* (the case cited in the Proposed Rules) did not rise to the level of persecution because they lacked “corroborating harm,” and “not merely because they were unfulfilled.”¹⁴⁰

Likewise, the Proposed Rules cite to *Guan Shan Liao v. U.S. Dep’t of Justice*, 293 F.3d 61 (2d Cir. 2002), but that decision merely held that the vague threat against the petitioner did not constitute persecution, not that threats as a whole can never constitute persecution. The same goes for the First Circuit decision in *Ang v. Gonzales*, 430 F.3d 50 (1st Cir. 2005). The Proposed Rules quote the Court’s statement that “baseline, hollow threats” cannot constitute persecution.¹⁴¹ But in the very next paragraph, the Court states, “A direct threat to an individual’s life can constitute past persecution.”¹⁴² This is consistent with the First Circuit’s general standard that “credible, specific threats can amount to persecution if they are severe enough.”¹⁴³

All of these cases stand for the well-known principle that threats that are imminent (meaning they are credible or likely to be fulfilled) and serious (or menacing) can constitute persecution. The question of whether a threat is imminent or credible does not depend exclusively on whether the perpetrator had attempted to act on the threat, as the Second Circuit noted in *Guan Shan Liao*. It can depend on many other factors, including the perpetrator’s ability, authority, and history of acting on similar threats.¹⁴⁴

The determination of whether a specific threat in a particular case constitutes persecution will always depend on the individual facts of the case, but that does not make the decisions analyzing those individual facts inconsistent. It is simply the result of an asylum system that is individualized and case-specific, which is necessary in order to ensure asylum seekers receive protection. The Proposed Rules significantly undermine this principle and will result in more legitimate refugees being returned to countries where they fear persecution.

¹³⁸ *Doe v. Atty’y Gen.*, 956 F.3d 135, 144 (3d Cir. 2019),

¹³⁹ *Id.*

¹⁴⁰ *Id.* (internal citation omitted).

¹⁴¹ 85 Fed. Reg. at 36281.

¹⁴² *Ang*, 430 F.3d at 56.

¹⁴³ *Javed*, 715 F.3d at 395-96; see also *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (death threat constitutes persecution).

¹⁴⁴ See, e.g., *N.L.A. v. Holder*, 744 F.3d 425, 432 (7th Cir.) (citing evidence that FARC had followed through on previous threats as evidence of credibility).

D. The Proposed Rules Improperly Raise the Persecution Definition to the Level of Harm Required for CAT Relief.

The Proposed Rules repeatedly emphasize that persecution requires “a severe level of harm.”¹⁴⁵ In fact, in the sections defining persecution, the Proposed Rules use the word “severe” no less than five times.¹⁴⁶

It is well-established that the level of persecution necessary to establish asylum eligibility is less than the level of harm needed to obtain CAT relief. Under the latter, in order to rise to the level of torture, harm must inflict “severe pain or suffering, whether physical or mental.”¹⁴⁷ In contrast, the term “persecution” has been consistently defined to include less severe forms of harm.¹⁴⁸

By defining persecution as “an extreme concept” that involves “a severe level of harm that includes actions so severe that they constitute an exigent threat,” the Proposed Rules have created a standard that is, at best, incomprehensible. As a practical matter, what can this definition of persecution possibly mean if it requires “severe” harm magnified four times (“extreme” harm that involves a “severe” level of harm made up of “severe” actions that constitute an “exigent threat”)?

At worst, the definition creates the appearance that the level of harm necessary to show persecution is now the same as the level necessary to show torture. That this is done in Proposed Rules that create the first regulatory definition of persecution, and without differentiating from the standard for torture, means that confusion surrounding the proposed definition and its application in individual cases will be significant and will result in erroneous denials of asylum.

¹⁴⁵ 85 Fed. Reg. at 36291, 36300.

¹⁴⁶ *Id.*

¹⁴⁷ 8 C.F.R. § 1208.18(a)(1).

¹⁴⁸ *See, e.g., Nuru v. Gonzales*, 404 F.3d 1207, 1224 (9th Cir. 2005) (“In finding that Nuru was tortured . . . Nuru has sufficiently established that he has been *persecuted* within the meaning of the Act. . . . This is because torture is more severe than persecution.”) (emphasis in original); *Chaib v. Ashcroft*, 397 F.3d 1273, 1277-78 (10th Cir. 2005) (“CAT is not concerned with the reasoning of the persecution, just whether the persecution arises to the level of torture.”); *Mouawad v. Gonzales*, 485 F.3d 405, 412 (8th Cir. 2007) (“[F]or example, “persecution for the purposes of asylum and withholding of removal may encompass abuse that is less severe than “torture” for the purposes of the CAT”); *Efe v. Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002) (“Another difference is that CAT does not require persecution, but the higher bar of torture.”); *Kyaw Zwar Tun v. INS*, 445 F.3d 554, 567 (2d Cir. 2006) (“[T]orture requires proof of something more severe than the kind of treatment that would suffice to prove persecution.”).

E. The Proposed Rules Conflate the Definition of Persecution with the Nexus and State Actor Elements.

The Proposed Rules repeatedly and erroneously conflate the different asylum elements, which will result in increased confusion in immigration courts and asylum offices across the country; increased erroneous decision making; and increased appeals. Nowhere is this more apparent than the Proposed Rules' description of what is required to establish persecution. Confusingly, the Proposed Rules assert that persecution comprises three elements, only one of which relates to whether the harm is sufficiently severe to constitute persecution.¹⁴⁹ The other two elements relate to whether the persecution was inflicted on account of a protected ground and whether the persecution was by the government or an entity the government is unable or unwilling to control.¹⁵⁰

1. This conflation creates a circular definition of persecution.

Courts have often referred to “past persecution” as shorthand for the question of whether an asylum seeker has established a presumed fear of future persecution based on “past persecution.”¹⁵¹ When used in that context, the phrase refers to whether the asylum seeker has established past persecution, on account of a protected ground, by the government or an entity the government is unable or unwilling to control—it is only when all of these elements are established as to past persecution that the presumed future fear arises.

For example, in *Yasinsky v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013), the Seventh Circuit determined that the petitioner Yasinsky had suffered harm rising to the level of persecution. However, that did not ultimately mean Yasinsky was able to obtain asylum “because he did not demonstrate that the beatings and threats were carried out by the Ukrainian government or by a group that the government was unable or unwilling to control—a necessary element for showing past persecution.” In that case, the Court referred to Yasinsky’s failure to demonstrate “past persecution” as shorthand for the standard an asylum seeker must meet in order to receive the regulatory presumption of future fear, while separately referring to “persecution,” the element Yasinsky did meet, when discussing whether Yasinsky had suffered sufficient harm to be eligible for asylum.

In other words, at present, the regulations create the following standard: Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Presumption of Future Persecution. In contrast, the confused and conflated wording of the proposed regulations would

¹⁴⁹ 85 Fed. Reg. at 36291.

¹⁵⁰ *Id.*

¹⁵¹ 8 C.F.R. § 1208.13(b)(1).

create the following circular standard: Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Persecution.

2. This conflation renders entire sections of the statute superfluous.

Aside from creating confusion and erroneous adjudications, the new definition of persecution contained in the proposed regulations would make the nexus and unable/unwilling to control/state actor elements completely superfluous. If the term “persecution” itself contains the “on account of” and the unable/unwilling/state actor elements within it, then there would be no need for the asylum definition or regulations to separately include these elements.¹⁵² The fact that the statute separately lists these elements in the definition of a refugee makes clear Congress’s intent to define persecution separately from these other two elements. The attempt by the Departments to add these elements into the definition of persecution itself creates an internal redundancy that makes the regulations inconsistent with the rest of the current regulations and the asylum statute itself.

3. The specific examples of harm the Proposed Rules identify as not constituting persecution conflate the persecution and nexus elements.

In addition to defining persecution itself by these other two elements, the Proposed Rules also conflate the elements within the specific examples of situations that the Departments assert should not constitute persecution. Among the most problematic example is the statement that “[p]ersecution does not encompass the generalized harm that arises out of civil, criminal, or military strife in a country.”¹⁵³ The phrase “generalized harm” is vague and irrelevant because it tells the adjudicator nothing about whether the asylum seeker has suffered persecution. The *type* of harm inflicted, when considered cumulatively with any other harm the asylum seeker experienced, is relevant to the persecution analysis. Whether that past harm is “generalized” is relevant to the nexus question.

For example, a Syrian woman, whose place of business was regularly bombed by the Assad regime, may have suffered harm sufficiently severe to rise to the level of persecution. It is possible that harm was “generalized” in the sense that the regime was “generally” bombing many neighborhoods without a plan to target any particular individuals. It is also possible that the woman’s place of business was regularly bombed because she is a doctor, her place of business was a hospital, and the regime has a well-documented policy of intentionally targeting

¹⁵² 8 U.S.C. § 1101(a)(42) (defining a refugee as someone who [(1)] “is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country” [(2)] because of persecution or [(3)] a well-founded fear of persecution [(4)] on account of [(5)] race, religion, nationality, membership in a particular social group, or political opinion”); 8 C.F.R. § 208.13(b)(2), 1208.13(b)(2)

¹⁵³ 85 Fed. Reg. at 36290, 36300.

medical professionals and hospitals.¹⁵⁴ These facts relate to whether the woman was targeted individually or as a result of indiscriminate violence against the general population and may ultimately determine whether or not the woman is able to establish asylum eligibility. However, they are relevant to the question of nexus, not whether the harm rose to the level of persecution in the first place.

Similarly, the Proposed Rules state “[t]he existence of laws or government policies that are unenforced or infrequently enforced do not, by themselves, constitute persecution, unless there is credible evidence that those laws or policies have been or would be applied to an applicant personally.”¹⁵⁵ Once again, this statement is certain to create confusion among adjudicators regarding its meaning and impact on the analysis of the persecution element.

The existence of laws or government policies is relevant to many aspects of an asylum claim: whether the persecutor was a state actor or someone the government is unable or unwilling to control; whether internal relocation is safe and reasonable; and the likelihood that the asylum seeker will be persecuted in the future. (The BIA has also listed laws and policies as evidence relevant to whether a PSG is “socially distinct”.¹⁵⁶) The existence of laws or policies is not itself persecution, but it can certainly result in the persecution of the asylum seeker. The convoluted language of the proposed regulations, however, may be misinterpreted to prohibit this.

For example, a country may forbid religious conversion, but little evidence may exist that the law is regularly enforced. This law would not in itself establish that anyone had suffered or will suffer persecution, but the very existence of this law may result in the suppression of the religious practices of a particular asylum seeker from that country, and *this* may constitute persecution, depending on the specific facts of the case.¹⁵⁷ Similarly, a country may prohibit sexual activity between individuals of the same gender, but may not frequently convict anyone under the law. Nonetheless, the law itself may result in preventing an asylum seeker from that country from living openly as a gay man and that may rise to the level of persecution. Under the proposed regulations, however, there will be substantial confusion about whether adjudicators can consider evidence of these laws and policies, ultimately resulting in more erroneous decisions; more appeals; and more asylum seekers being erroneously denied protection.

¹⁵⁴ See, e.g., Ben Taub, *The Shadow Doctors*, *The New Yorker*, June 20, 2016, available at <https://www.newyorker.com/magazine/2016/06/27/syrias-war-on-doctors> (“In the past five years, the Syrian government has assassinated, bombed, and tortured to death almost seven hundred medical personnel.”).

¹⁵⁵ 85 Fed. Reg. at 36291, 36300.

¹⁵⁶ *Matter of M-E-V-G-*, 26 I. & N. Dec 227, 244 (BIA 2014).

¹⁵⁷ See, e.g., *Kantoni v. Gonzales*, 461 F.3d 894, 899 (7th Cir. 2006) (“A credible threat that causes a person to abandon lawful political or religious associations or beliefs is persecution.”).

VII. The Proposed Rules Seek to Reinvent the Nexus Concept in a Way that Departs Entirely from the Law.

As with each asylum element addressed in these Proposed Rules, the Departments allege confusion among adjudicators as the justification for new regulations. These complications arise not from inherent unworkability of the law as written by Congress and interpreted by the courts. Rather, they stem from the government’s efforts to rewrite the law through regulation and administrative decisions that contort the basic elements of asylum beyond recognition.

The Departments’ treatment of nexus is no exception. Nexus or the “on account of” element of asylum is the simple inquiry into whether the persecution experienced and/or feared by the asylum seeker is on account of one or more of the five protected grounds. As noted in the Proposed Rules, the protected ground must be at least one central reason for the harm, meaning there can be multiple central reasons—and the salient reason need only be one. As the Seventh Circuit has poignantly noted, “it is the nexus requirement where the rubber meets the road.”¹⁵⁸ The fact that nexus is the linchpin that connects the other elements does not mean it is inherently complex and in need of revision. On the contrary, the Proposed Rules mangle the concept of nexus, overcomplicate the test, and, if implemented, will result in broad confusion among applicants and adjudicators, leading to litigation; the exact result the Departments purport to wish to avoid with these Proposed Rules.

A. *Proffering an Arbitrary List of Non-Nexus Situations is Nonsensical and Says Nothing About Whether a Nexus Between Persecution and a Protected Ground Exists.*

The Departments set out a list of situations where adjudicators “will not favorably adjudicate asylum.” The fact of this non-exhaustive list is an *Accardi* violation. The Departments cannot inoculate themselves against this by tossing in the term “in general” and then pronouncing a laundry list of cases that must be denied. Asylum is fact sensitive and case specific. The Departments cannot simply draw up a wish list of cases they would like to foreclose and then purport that the law requires it or, at least, allows it. Nexus looks at whether the harm was “on account of” the protected ground. What the Departments propose is an inquiry far beyond the established parameters of this element. None of the items on the list meaningfully address whether harm occurred on account of a protected ground and so the Proposed Rules cannot stand. What follows is the list set forth by the Departments and a brief explanation of why a blanket rule that nexus is inadequate in these situations is improper.

¹⁵⁸ *Cece*, 733 F.3d at 673.

1. “Personal animus or retribution” situations may well reflect persecution on account of a protected ground.

First, there may be mixed motives for the harm such that part of the reason is on account of a protected ground even if another reason may be untethered from it. *See* Matter of J–B–N– & S–M–, 24 I&N Dec. 208, 211 (BIA 2007). Second, “personal” animus fueled by cultural promotion or acceptance of the harm (like machismo or honor killing) moves the harm beyond “personal.” The Seventh Circuit explains this nuance between personal animus and culturally accepted persecution effectively in the honor killing context:

Perhaps there is superficial appeal to this argument, but its force dissipates quickly when we examine it more carefully. There is no personal dispute between [the asylum seeker] and her brother. He has not vowed to kill her because of a quarrel about whether she or [the brother] should inherit a parcel of land, or because she did a bad job running his store, or because she broke [the brother’s] favorite toy as a child. She faces death because of a widely-held social norm in Jordan—a norm that imposes behavioral obligations on her and permits [the brother] to enforce them in the most drastic way. The dispute between [the asylum seeker] and [the brother] is simply a piece of a complex cultural construct that entitles male members of families dishonored by perceived bad acts of female relatives to kill those women. The man who does the killing may have a personal motivation in the sense that he is angry that his sister has dishonored the family, or he may regret the need to take such an irrevocable step. Either way, he is killing her because society has deemed that this is a permissible—maybe in some eyes the only—correct course of action and the government has withdrawn its protection from the victims. The very fact that these are called “honor killings” demonstrates that they are killings with broader social significance.¹⁵⁹

The Departments do not heed the warnings of the Seventh Circuit with the proposed amendment. In fact, they risk returning to harm countless women and LGBTQIA+ survivors,¹⁶⁰ who experienced culturally accepted harms perpetrated by individuals.

¹⁵⁹ *Sarhan v. Holder*, 658 F.3d 649, 656 (7th Cir. 2011)

¹⁶⁰ *See generally*, Alejandra Oliva, “Pride After Prejudice: Ella’s Story,” NIJC (June 30, 2020), *available at* <https://immigrantjustice.org/staff/blog/pride-after-prejudice-ellas-story> (relaying claim from asylum seeker, who fled dangerous and abusive conditions, that “In my culture, being from the LGBTQ community means you are sick”); Oliva, “Finding the Missing Piece: Osiel’s Story,” NIJC (July 6, 2020), *available at* <https://immigrantjustice.org/staff/blog/finding-missing-piece-osiels-story> (asylee reports feeling safe after “years of facing discrimination at work, including being forced to resign, struggling to get adequate treatment for his HIV+ status, and being unable to live freely as a gay man” in home country).

2. “Interpersonal animus in which the alleged persecutor has not targeted, or manifested an animus against, other members of an alleged PSG in addition to the member who has raised the claim at issue” presents the same flaw as above.

When considering persecution connected to a cultural phenomenon, nexus is often there. As the First Circuit recently noted: “In some countries, gender serves as a principal, basic differentiation for assigning social and political status and rights, with women sometimes being compelled to attire and conduct themselves in a manner that signifies and highlights their membership in their group.”¹⁶¹ When one is persecuted for flouting those norms, it is not merely interpersonal animus, but rather on account of a protected ground. Moreover, targeting one group member does not mean the persecutor is unaware of other group members. For example, record evidence in cases frequently establishes that many who persecute on account of gender believe that every man has the right to control his partner by virtue of being a man.

3. “Generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a discrete cause against such organizations related to control of a state or expressive behavior that is antithetical to the state or a legal unit of the state” ignores broadly recognized imputed political opinion claims as well as the reality that actions not normally considered textbook expressions of opinion to some adjudicators are nonetheless received by persecutors as clear expressions of opposition, for which the individual must be punished.

For example, the Third Circuit recently recognized that a man seen talking to police and presumed by gang members to be a snitch may qualify for asylum. The Court said: “We thus hold that a group consisting of witnesses who have publicly provided assistance to law enforcement against major Salvadoran gangs meets all three criteria for being a PSG. Our analysis remains the same even though Guzman did not actually provide information to the Salvadoran police. Contrary to the IJ’s unsupported assertion, asylum and withholding of removal under the INA may be granted on the basis of imputed, not just actual, membership in a particular social group.” *Guzman Orellana v. Attorney Gen. United States*, 956 F.3d 171, 180 (3d Cir. 2020)

¹⁶¹ *De Pena-Paniagua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020).

4. “Resistance to recruitment or coercion by guerilla, criminal, gang, terrorist, or other non-state organizations” says nothing about *why* one may be harmed for resisting such a group.

And that is precisely the work of the nexus prong; to explore the reason for the harm, not merely the action taken by the asylum seeker. With this, the Departments appear to be conflating asylum elements, not clarifying nexus. Furthermore, this is bad policy. Is this not precisely what people should be encouraged to do—i.e., decline to join gangs and terrorist groups? And yet the Proposed Rules claim that taking such action cannot give rise to access to protection.

5. “The targeting of the applicant for criminal activity for financial gain based on wealth or affluence or perceptions of wealth or affluence” fails to acknowledge the mixed motives doctrine as well as the fact that this scenario may indeed arise in the context of a viable asylum claim; where one’s immutable characteristic is perceived wealth or affluence.

As the Seventh Circuit found:

“We are aware that many other Colombians, including poor farmers, are victims of violence by FARC, but this does not mean that wealthy landowners are not targeted as such...They have shown that their suffering was differentiated from the rest of the population and that FARC targeted them because of their PSG identity. The threats against them did not constitute indiscriminate violence. While we are sure that FARC would be happy to take the opportunity to rob any Colombian (or foreigner for that matter) of his money, it is those who can be identified and targeted as the wealthy landowners that are at continued risk once they have been approached and refused to cooperate with FARC's demands.” *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 673 (7th Cir. 2005).

There is no legitimate reason that nexus could not be found in such a case and proposing a rule that seeks to rule out such cases runs afoul of the statute.

6. “Criminal activity” requires no specific rule.

If an asylum seeker has experienced harm that may be construed only as criminal activity and is disconnected from any protected ground, that individual may not qualify for asylum. Announcing a specific rule on this is entirely superfluous and creates confusion where previously there was none.

7. “Perceived, past or present, gang affiliation” suffers from the same flaw noted above in the “resistance” category.

The language in the Proposed Rules describes a group of people but says nothing about why they might have been persecuted in the past and or may be in the future. If the Departments mean to say that one persecuted on account of her real or perceived gang affiliation cannot establish nexus, the Departments' quarrel is with the contours of the possible PSG, not the question of whether one may have been harmed because of membership in that group. As explained *supra*, it is legally wrong to assert such a PSG cannot prevail. It is also wrong to suggest that if the group is established, the harm can never be on account of membership in that group. Moreover, to the extent the Departments wish to advance a policy against granting asylum to current or former gang affiliates, there are existing statutory bars to asylum that address those concerns, rendering the attempt to do so via nexus regulation not only misguided and legally improper, but also unnecessary.¹⁶²

8. Finally, the Departments' assertion that nexus may never exist between one's "gender" and persecution is also a misfire; seemingly aimed at preventing recognition of gender as a protected ground and saying nothing about nexus.

The Departments confusingly suggest that harm cannot be on account to gender because gender is too big a class of people. Again, whether there are many or few people in a group asserting harm says nothing about whether they have been harmed on account of their shared characteristic. Asylum law requires a case by case analysis. As noted by the Seventh Circuit: "the statute makes eligible a person persecuted because of his membership in a protected category; it does not require that all members of that category suffer the same fate. The law calls for assessments of causation and risk[.]"¹⁶³ Gender-based asylum claims ought to be assessed in the same way as all other asylum claims. Where one is a member of a gender-based particular group, the adjudicator must assess whether the asylum seeker was harmed on account of her membership in that group; whether she has a well-founded fear of future persecution for that reason; whether her government is willing and able to protect her; whether she can relocate internally to avoid harm; whether any of the bars to asylum apply to her. Some applicants will meet each of these elements, others will not. Short-circuiting the inquiry by attempting to suggest it invariably ends at nexus in gender cases is a profoundly improper reading of asylum law and ought not be incorporated into any forthcoming regulations.

The Departments cherry-pick snippets from a few cases they claim support asylum denial in these scenarios. They ignore bodies of law to the contrary and seek to use the nexus to foreclose asylum by misinterpreting nexus.

¹⁶² *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

¹⁶³ *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014).

B. The Departments' Comment That "Pernicious Cultural Stereotypes Have No Place in the Adjudication of Applications for Asylum and Statutory Withholding of Removal, Regardless of the Basis of the Claim" is Offensive.

The Departments' efforts to cast asylum seekers presenting verified evidence and credible expert testimony in support of claims of entrenched violence against women, permitted and perpetrated by the governments charged with providing protection, as cultural insensitivity or meritless defamation is akin to suggesting Tutsis resisting the Rwandan genocide were slandering their murderers. It is wildly irresponsible, deeply inaccurate, and dangerously inflammatory. The asylum statute imposes a burden of proof on asylum seekers. They must meet that burden in order to prevail. If an adjudicator finds the evidence presented by an asylum seeker to be insufficient, she may lose her case. There is no ambiguity in this section of the law and no conceivable reason the Departments would have cause or reason to propose this language other than in an odious effort to cast victims as perpetrators and short circuit access to protection through misinformation and an astonishing level of willful blindness.

VIII. The Departments' Changes to Internal Relocation Impose an Unreasonable Evidentiary Burden on Asylum Seekers, Conflicts with Binding Precedent, and Invites Bias and Confusion in Adjudications.

The Proposed Rules propose three key changes on internal relocation: first, the Proposed Rules presume that relocation is reasonable for governmental or government-sponsored persecutors; second the Proposed Rules exclude gangs, rogue officials, family members, and neighbors from the category of government-sponsored persecutors; finally, the Proposed Rules revise the list of factors for reasonableness determinations. As set forth below, these changes are confusing, inconsistent with binding precedent, and tailored to harm a large category of asylum seekers.

A. The Proposed Rules Effectively Lift the Burden Off of DHS to Demonstrate That the Asylum Seeker Can Safely and Reasonably Relocate.

Current regulations require that adjudicators first determine whether "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country" and if so, whether "under all the circumstances, it would be reasonable to expect the applicant to do so." 8 CFR § 208.13(b)(1)(i)(B) & (b)(2)(ii). The regulations further indicate that government-sponsored persecution makes relocation presumptively unreasonable. The regulations place the burden on DHS to rebut a presumption of future persecution for asylum seekers who fled, by showing that they can reasonably relocate to a safe part of the country.

In contrast, these Proposed Rules largely lift the burden off DHS and impose it on asylum seekers. Specifically, they provide that the government needs not show that internal relocation is

reasonable where the persecutor is a non-governmental actor, even where applicants have already shown past persecution. In practice, this means that countless women, children, and LGBTQIA+ survivors of past persecution will face a higher evidentiary burden.

The Departments' nonchalance in piling evidentiary burdens onto traumatized asylum seekers is unacceptable. As NIJC's client Ronda explains, "[t]he opportunity to seek asylum gives people fleeing violence hope. Closing the doors on this hope would be cruel, and I know that if these changes had been adopted earlier, they would've hurt me and my family. Fleeing my country and leaving behind my children has shown me how difficult the process of seeking asylum already is, and we should not complicate an already difficult process for people who are fleeing death and torture."¹⁶⁴ It is hard to understate the harm these obstructive Proposed Rules will inflict, in contravention of the Departments' duty to shield asylum seekers.

B. The Proposed Rules' Micromanagement of Who is Disqualified as Government-sponsored Persecutors Conflicts with Binding Precedent.

By excluding certain private actors from the label of "government-sponsored" persecutors, the Departments not only heighten the burden of asylum seekers, but create a direct conflict with binding precedent.¹⁶⁵ AOs and IJs will be compelled to prejudge asylum seekers fleeing the non-governmental persecutors, even where they meet the high burden of establishing past persecution. AOs and IJs will be tethered in their factual analysis and inhibited in developing the record because the Proposed Rules will restrict case-by-case review. As stated prior, boilerplate adjudications that thwart *required* case-by-case review¹⁶⁶ particularly jeopardize *pro se* applicants—a cruel byproduct given the lack of representation for the majority of asylum seekers.

Finally, this restriction lacks justification. A "rogue official" is defined elsewhere in the Proposed Rules and could be construed broadly to cover a government official who acted while not on duty or in uniform, or who threatened to retaliate if the victim reported him to the authorities. Additionally, there is extensive evidence that gangs often collude with governmental authorities, blurring the line between them and other government sponsored actors.¹⁶⁷ A similar

¹⁶⁴ See Comment of Ronda Doe, as submitted by Jesse Franzblau; Tracking Number: [1k4-9htv-t2po](#).

¹⁶⁵ The Board has repeatedly emphasized that case-by-case analysis is the keystone of asylum adjudications. *Acosta*, 19 I. & N. Dec. at 233 ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis"); *M-E-V-G-* emphasized that its. *M-E-V-G-*, 26 I. & N. Dec. at 251 (holdings "should not be read as a blanket rejection of all factual scenarios involving gangs").

¹⁶⁶ See *supra* Section IV.B. (discussing *Accardi*).

¹⁶⁷ See *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 952 (4th Cir. 2015) ("Hernandez's affidavit, in combination with the other evidence presented in this case, suggests that the police in her neighborhood may be subject to gang influence.").

concern may be at play with family or neighbors whose persecutory conduct is sanctioned by a government.¹⁶⁸ For example, there are many women and children who flee domestic and sexual violence perpetrated by close relatives or neighbors and willfully ignored by government officials. By excluding those persecutors outright, the Proposed Rules draw arbitrary categories that can create adjudicatory inefficiencies and prevent case-by-case adjudication as required under binding law.

C. The Proposed Rules' Listed Factors are Likely to Spur Confusion and Instill Bias in Adjudicators.

The Proposed Rules label the non-exhaustive factors of existing regulations “unhelpful” and “little practical” guidance to adjudicators.¹⁶⁹ A number of courts that swiftly applied current regulatory factors would beg to differ with the Departments’ conclusory statement that they are unhelpful guidance.¹⁷⁰ Nonetheless, the Departments find “administrative, economic, or judicial infrastructure” and “geographic limitations” irrelevant to the reasonableness of relocation. The Departments do not explain why administrative, economic, and judicial infrastructure is irrelevant to asylum seekers who have limited means to safely relocate. Instead, the Departments presume that an asylum seekers’ ability to travel to the United States for refuge invalidates “geographic limitations” as a viable factor. The Proposed Rules’ alternative, exhaustive list of factors are: the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant’s demonstrated ability to relocate to the United States in order to apply for asylum.

There are a number of challenges with these new factors. First, the Departments’ insistence that the current non-exhaustive list of factors is “unhelpful” betrays further disregard for case-by-case adjudication. Asylum seekers merit individualized adjudication that weighs the multitude of factors at play in their inability to relocate. Second, the focus on the size, reach, and numerosity of the persecutor once again prejudices women and children, as well as those fleeing a powerful but lone persecutor. The fact that a persecutor is a singular individual does not undermine their ability to inflict future harm on an asylum seeker in a different part of the country. It is unclear what size and reach refer to where a persecutor is a non-governmental actor, either, distracting again from the fact-specific inquiry that adjudicators should engage in to actually assess reasonableness of relocation.

¹⁶⁸ See *Acosta*, 19 I. & N. Dec. at 233 (naming kinship as an immutable PSG characteristic that may entitle applicants to asylum).

¹⁶⁹ 85 Fed. Reg. at 36282.

¹⁷⁰ See, e.g., *García-Cruz v. Sessions*, 858 F.3d 1, 8–9 (1st Cir. 2017); *Arboleda v. U.S. Attorney Gen.* 434 F.3d 1220, 1223–24 (11th Cir. 2006); *Gonzalez-Maldonado v. Ashcroft*, 123 Fed. App’x 277, 278–79 (9th Cir. 2005); *Gambashidze v. Ashcroft*, 381 F.3d 187, 191–94 (3d Cir. 2004).

Similarly, it is unclear why the Proposed Rules are preoccupied with the size of the country of transit (presumably the country of last habitual residence, but for contiguous countries), or what the term “habitual residence” references. It appears to be a covert way to fold the firm resettlement bar into the analysis of reasonable internal relocation—altogether amounting to a confusing and misguided inquiry.

Finally, the applicant’s ability to relocate to the United States to seek asylum is a naked attempt to categorize all asylum applicants as able to internally relocate. This biased approach does not comport with U.S. and international mandates of non-refoulement,¹⁷¹ which heighten the bar for such aborted and short-sighted analysis. As the Second Circuit recently noted, an asylum seeker’s inability to escape the persecution faced in home country hinges on combined “cultural, societal, religious, economic, or other factors;”¹⁷² asylum seekers seek to free themselves of persecution, as well as the conditions that enabled this persecution in the first place. Assuming that relocation to the United States means the ability to relocate internally ignores the complex factors that motivate an asylum seeker’s flight across borders to find long-awaited safety.

By departing from existing reasonableness standards, the Departments show little concern for the perilous journey many asylum seekers engage in to seek refuge in the U.S. As one asylum seeker poignantly put it, “It’s full of fear, full of risk, to cross borders.”¹⁷³ Asylum seekers take on this risk *because* they cannot find safety in their own country. The Departments forget this simple fact, and tailor new rules to oust those who incur tremendous risks to find safety in the U.S.

IX. The Proposed Rules Attempt to Use the Discretionary Nature of Asylum to Establish 14 New Bars to Asylum That Are Inconsistent with the Statute.

Under domestic and international law, it is well-established that a negative discretionary factor must be significantly egregious to result in a denial of asylum for an asylum seeker who has met the refugee definition. The BIA first made this clear in *Matter of Pula*, 19 I. & N. Dec. 467 (BIA 1987). In *Pula*, which focused heavily on the relevance (or lack thereof) of an asylum seeker’s manner of entry to the United States to an adjudicator’s discretionary decision to grant asylum, the BIA emphasized that the discretionary determination in an asylum case required an examination of “the totality of the circumstances,” both positive and negative.¹⁷⁴ And within this “totality of the circumstances” analysis, “the danger of persecution should generally outweigh all

¹⁷¹ Convention Relating to the Statute of Refugees (“Refugee Convention”), art. xxxiii, July 28, 1951, 140 U.N.T.S. 1954.

¹⁷² Cf. *De Pena Paniagua v. Barr*, 957 F.3d 88, 93-94 (2d Cir. 2020) (examining woman’s inability to leave).

¹⁷³ See Comment of Helen Doe, *supra* n.2.

¹⁷⁴ 19 I. & N. Dec. at 473–74.

but the most egregious of adverse factors,” where a negative discretionary determination would result in deportation.¹⁷⁵

This is consistent with international law. By acceding to the 1967 Protocol Relating to the Status of Refugees¹⁷⁶, which binds parties to the United Nations Convention Relating to the Status of Refugees¹⁷⁷, the United States obligated itself to develop and interpret U.S. refugee law in a manner that complies with the Protocol’s principle of non-refoulement (the commitment not to return refugees to a country where they will face persecution on protected grounds), even where there are negative discretionary factors associated with a potential refugee. While Congress established withholding of removal as a potential backstop for individuals who face persecution in their home country, but are barred from or found to be discretionarily ineligible for asylum, withholding of removal is an extremely subpar form of protection due to the lack of derivative benefits for spouses and children.

Moreover, as the BIA noted in *Pula*, the higher burden of proof required for withholding can create (and has created¹⁷⁸) scenarios in which refugees are deported to countries where it is recognized they face a reasonable possibility of persecution due to an adjudicator’s discretionary denial of asylum and the asylum seeker’s inability to meet the higher burden of proof for withholding.¹⁷⁹ The BIA in *Pula* referred to this scenario as one “of particular concern” and asserted that where “[d]eportation to a country where the alien may be persecuted thus becomes a strong possibility. . . . the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution.”¹⁸⁰ Thus, “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”¹⁸¹

Here, the proposed regulations are not only inconsistent with this fundamental principle, but also completely inconsistent with the concept of discretion. Discretion refers to individual choice or judgment¹⁸²; the exercise of judgment by a judge or a court based on what is fair under the

¹⁷⁵ 19 I. & N. Dec. at 474.

¹⁷⁶ United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 268.

¹⁷⁷ Convention Relating to the Statute of Refugees, July 28, 1951, 140 U.N.T.S. 1954

¹⁷⁸ For example, in *Kouljinski v. Keisler*, 505 F.3d 534 (6th Cir. 2007), an asylum seeker from Russia was found eligible for asylum, denied asylum as a matter of discretion, and ordered deported to Russia because he could not meet the higher burdens of proof for withholding of removal and CAT relief.

¹⁷⁹ 19 I. & N. Dec. at 474.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/discretion>.

circumstances and guided by the rules and principles of law.¹⁸³ By creating a list of 14 factors that an adjudicator should consider at least “significantly adverse” (in the case of three of the factors) and at most, a barrier to a positive discretionary decision (in the case of 11 of the factors), the proposed regulations turn the concept of discretion on its head. Rather than discretionary factors, these 14 fact patterns serve as 14 new bars to asylum, even though they bear no resemblance to the statutory asylum bars created by Congress.

A. *The First Set of Three Factors Deemed “Significantly Adverse” to Discretion Upend Matter of Pula and Deny the Reality of How Hard it is to Flee.*

First, the Proposed Rules list a series of three factors that adjudicators are required to consider as “significantly adverse” for purposes of the discretionary determination: 1) unauthorized entry or attempted unauthorized entry, unless “made in immediate flight from persecution or torture in a contiguous country”; 2) failure to seek asylum in a country through which the applicant transited, and 3) the use of fraudulent documents to enter the United States, unless the person arrived in the United States without transiting through another country.

This three-factor test quite simply sets asylum seekers up to be denied protection and deported back to harm *because they were able to successfully navigate an escape route from persecution to the United States*. It flips *Matter of Pula* on its face and contravenes Article 31 of the Refugee Convention.¹⁸⁴

In *Matter of Pula*, the BIA exercised favorable discretion in the case of an applicant who had all three of the factors described here present in his case: Mr. Pula 1) arrived in New York utilizing a false travel document he had purchased in Belgium, and did not upon arrival disclose his real identity or intent to seek asylum; 2) after leaving Yugoslavia, spent six weeks in Belgium and did not seek asylum there before continuing on to the United States; and 3) used the fraudulently obtained travel document to enter the United States.¹⁸⁵ The BIA considered the manner of Mr. Pula’s entry “only one of a number of factors which should be balanced in exercising discretion.”¹⁸⁶ Undoubtedly, Mr. Pula—who fled repeated detentions and physical abuse at the hands of the Yugoslav police—would be denied asylum under these Proposed Rules.

The first and third factors proposed by the Rules relate to manner of entry, a factor the drafters of the Refugee Convention explicitly warned can never be used to penalize asylum seekers. Notes written at the time of the Conventions’ drafting explain why: “A refugee whose departure from

¹⁸³ Judicial discretion definition, Black’s Law Dictionary (11th ed. 2019).

¹⁸⁴ Convention Relating to the Statute of Refugees, art. xxxi, ¶ 1, July 28, 1951, 140 U.N.T.S. 1954 (forbidding the imposition of penalties on refugees “on account of their illegal entry or presence”).

¹⁸⁵ *Pula*, 19 I. & N. Dec. at 495–96.

¹⁸⁶ *Id.* at 473.

his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge.”¹⁸⁷ Article 31 of the Convention, for this reason, provides that: “Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 31, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”¹⁸⁸

In the decades following the Convention’s drafting, the international community has coalesced around the consensus that “a well-founded fear of persecution is generally accepted as a sufficient good cause” per Article 31.¹⁸⁹ *Pula* itself supports this reading by warning against placing “too much emphasis on the circumvention of orderly refugee procedures,” noting that considering irregular entry with too much weight may have the practical effect “to deny relief in virtually all cases.”¹⁹⁰ The Board has subsequently affirmed this note of caution, and circuit courts of appeals have followed suit.¹⁹¹

The second factor, failure to seek asylum in a country of transit is similarly contrary to the spirit of the Convention, but also makes no sense of the context of other provisions of United States asylum law. Section 208 of the INA already provides a statutory bar to asylum for those found to have “firmly resettled” in a country prior to entering the United States.¹⁹² This “firm resettlement” bar has been widely litigated, and immigration adjudicators must follow a four-part test developed by the BIA to determine its application.¹⁹³ That framework places the burden on the government to “secure and produce direct evidence of governmental documents” indicating the applicant’s ability to stay in a country indefinitely before the adjudicator may even consider whether the firm resettlement bar applies.¹⁹⁴ The Proposed Rules would render this framework and the statutory law it interprets surplusage by presuming a negative discretionary determination *for* any person who transited through a third country, regardless of circumstance.

¹⁸⁷ Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection* (October 2001), <https://www.unhcr.org/3bcfdf164.pdf>, at para. 15 (a paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations).

¹⁸⁸ Refugee Convention, *supra* n. 171, at art. xxxi.

¹⁸⁹ Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection* (October 2001), <https://www.unhcr.org/3bcfdf164.pdf>, at para. 35.

¹⁹⁰ *Pula*, 19 I. & N. Dec. at 473.

¹⁹¹ *See, e.g., See also Matter of Kasinga*, 21 I. & N. Dec. 357, 367 (BIA 1996) (“The danger of persecution will outweigh all but the most egregious adverse factors.”); *Zuh v. Mukasey*, 547 F.3d 504, 511 n.4 (4th Cir. 2008).

¹⁹² 8 U.S.C. 1158(b)(2)(A)(vi).

¹⁹³ *Matter of A-G-G-*, 25 I. & N. Dec. 486, 503 (BIA 2011).

¹⁹⁴ *Id.* at 496, 501.

This three-part category of proposed negative discretionary factors is evidence of the administration's intent to further a false narrative that paints asylum seekers as fraudsters, without evidence. In one of Former Attorney General Jeff Sessions' first speeches in office, he claimed that the asylum system was plagued by fraud, with fear claims skyrocketing and meritorious claims plummeting.¹⁹⁵ Although there is “no data that speaks plainly to that trend,”¹⁹⁶ the administration is intent on operating under this flawed assumption.

B. The Second Category of Negative Discretionary Factors Listed in the Proposed Regulations Would Effectively Operate as Per Se Bars to Asylum.

Even more so than the first category of negative discretionary factors identified by the proposed regulations, the second discretionary category described at 85 Fed. Reg. at 36293 and 36302 is arbitrary and capricious. Although framed as factors of “discretion,” these “factors” effectively operate as dramatically expanded bars to asylum for any asylum seeker subject to them because the proposed rules assert that adjudicators “will not favorably exercise discretion” if any of the described factors applies to the asylum seeker.¹⁹⁷

These discretionary bars would eliminate access to asylum for asylum seekers who: (1) spent more than 14 days in any one country immediately prior to her arrival in the United States or en route to the United States, with very limited exceptions unlikely to apply to many asylum seekers; (2) transits through more than one country en route to the United States, with the same, very limited exceptions; (3) would otherwise be subject to one of the criminal conviction-based asylum bars at 8 C.F.R. § 208.13(c) but for the reversal, vacatur, expungement, or modification of the conviction or sentence; (4) accrued more than one year of unlawful presence prior to applying for asylum; (5) has failed to timely file or request an extension of the time to file any required income tax returns, (6) has failed to satisfy any outstanding tax obligations, or (7) has failed to report income that would result in a tax liability; (7) has had two or more asylum applications denied for any reason; (8) has withdrawn a prior asylum application with prejudice or been found to have abandoned a prior asylum application; (9) failed to attend an asylum interview, with limited exceptions; or (10) did not file a motion to reopen of a final order of removal based on changed country conditions within one year of those changes.

¹⁹⁵ A transcript of that speech is available on the EOIR website at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

¹⁹⁶ Miriam Valverde, *Jeff Sessions claims asylum system rampant with fraud and abuse*, Politifact, Oct. 19, 2017, <https://www.politifact.com/factchecks/2017/oct/19/jeff-sessions/jeff-sessions-claim-about-asylum-system-fraudulent/>. See also Human Rights First, *Stoking Fears and Peddling Lies: the Trump Administration's Attacks on Asylum*, <https://www.humanrightsfirst.org/sites/default/files/Stoking-Fear-and-Peddling-Lies.pdf>.

¹⁹⁷ 85 Fed. Reg. at 36293, 36302.

These new discretionary bars constitute a dramatic departure from the statute, case law, and past practice, and the Departments have not offered any evidence or data to support these changes, which would bar numerous asylum seekers from protection and effectively eliminate any discretionary authority by adjudicators.

1. The Proposed Rules create discretionary “bars” that bear no resemblance to the statutory bars established by Congress.

Under the asylum statute, most of the bars to asylum relate to issues of safety and security.¹⁹⁸ In contrast, only one of the 10 discretionary “bars” created by the proposed regulations could theoretically relate to safety and security concerns - the provision related to convictions - although even that is dubious.¹⁹⁹ The rest of the new discretionary “bars” relate to innocuous activity that has no bearing whatsoever on whether the asylum seeker would pose any kind of safety or security risk to the United States, e.g., a failure to timely file a tax return or transit through another country en route to the United States.

2. Several of the discretionary “bars” conflict with the asylum statute.

A number of the discretionary bars proposed are directly inconsistent with the statute. The Proposed Rules assert that an adjudicator should deny asylum as a matter of discretion if the asylum seeker accrued more than one year of unlawful presence in the United States prior to filing for asylum.²⁰⁰ But the statute already makes an asylum applicant ineligible for asylum if she files for asylum more than one year after her last date of entry, except the statute contains two critical exceptions to this one-year deadline.²⁰¹ The Proposed Rules do not contain these exceptions, making the Proposed Rules both duplicative of and inconsistent with the statute. Similarly, while the statutory one-year deadline is based on the accrual of time since the applicant’s last entry into the United States, the Proposed Rules does not specify the timeframe for the accrual of unlawful presence that would bar asylum as a matter of discretion. Under the proposed rule, an individual could enter the United States, accrue 360 days of unlawful presence,

¹⁹⁸ 8 U.S.C. § 1158(b)(2)(A).

¹⁹⁹ Significantly, the bars to asylum based on allegations of criminal conduct are *already* sweeping and over-broad in nature and scope. Any conviction for an offense determined to be an “aggravated felony” is considered a *per se* “particularly serious crime” and therefore a mandatory bar to asylum, even though the term has metastasized to encompass hundreds of offenses, many of them neither a felony nor aggravated, including petty offenses such as misdemeanor shoplifting, simple misdemeanor battery, or sale of counterfeit DVDs. 8 U.S.C. §§ 1158(b)(2)(A)(ii) and (B)(i); 8 U.S.C. § 1101(a)(43). *See also* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 *Harvard Law Review* 1936, 1939–40 (2000) (criticizing the “Alice-in-Wonderland-like definition of the term ‘aggravated felony’”); Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provisions of the Immigration and Nationality Act as a Human Rights Violation*, 23 *Boston College Third World Law Journal* 293 (2003).

²⁰⁰ 85 Fed. Reg. at 36293, 36302.

²⁰¹ 8 U.S.C. § 1158(a)(2)(B).

return to her home country, experience past persecution and flee to the United States, and then be required to file for asylum within five days of entry in order to avoid this new unlawful presence bar. This is both nonsensical and creates a fluid and confusing target for asylum seekers, who would be obligated to calculate any previously accrued unlawful presence (which is no small task²⁰²) in order to determine their filing deadline.

The Proposed Rules that would bar asylum as a matter of discretion for an asylum seeker who has had “two or more prior asylum applications denied for any reason”²⁰³ is also inconsistent with the statute. The statute already provides that an individual is ineligible for asylum if the individual “previously applied for asylum and had such application denied.”²⁰⁴ The statute, however, provides a clear exception to this rule for individuals who demonstrate “the existence of changed circumstances which materially affect the applicant’s eligibility for asylum.”²⁰⁵ Without a similar exception, the Proposed Rules directly conflict with the statute.

Similarly conflicting and nonsensical is the Proposed Rules that would bar asylum as a matter of discretion for an individual subject to a final order of removal who did not file a motion to reopen to seek asylum based on changed conditions within one year of the changed conditions.²⁰⁶ As written, it is unclear if the rule intends to eliminate asylum for asylum seekers who have a final order of removal *unless* the asylum seeker files a motion to reopen based on changed country conditions *and* that motion is filed within one year of the changed conditions, or if the rule is only intended to bar from asylum an asylum seeker who has a final order of removal, files a motion to reopen based exclusively on changed country conditions, but does not file the motion within one year of those changes. That difference is critical; the statute allows for a motion to reopen to be filed at any time—and does not limit the relief that can be sought upon reopening—if the removal order was issued in absentia and the motion is based on a failure to receive notice of the underlying hearing or the respondent was in Federal or State custody and could not appear for that reason.²⁰⁷ If the Proposed Rules is attempting to restrict asylum for individuals with final orders of removal to only those who can file a motion to reopen based on changed conditions, the rule would be contrary to the statute.

²⁰² For example, on August 9, 2018, USCIS issued a policy memorandum regarding the accrual of unlawful presence for certain nonimmigrant visas, which describes the accrual of unlawful presence being dependent on numerous, fact-specific criteria. “Policy Memorandum: Accrual of Unlawful Presence and F, J, and M Nonimmigrants,” U.S. Citizenship and Immigration Services, Aug. 9, 2018, *available at* <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>.

²⁰³ 85 Fed. Reg. at 36293, 36302.

²⁰⁴ 8 U.S.C. § 1158(a)(2)(C).

²⁰⁵ *Id.*

²⁰⁶ 85 Fed. Reg. at 36293, 36302.

²⁰⁷ 8 U.S.C. § 1229a(b)(5)(C).

If, however, the Proposed Rules is intending to only eliminate access to asylum for asylum seekers who file motions to reopen based on a change in country conditions and fail to file the motion within one year of the change, the rule still conflicts with the statute. 8 U.S.C. 1229a(c)(7)(C)(ii) explicitly states that “[t]here is no time limit on the filing of a motion to reopen is to apply for relief under section 1158 [asylum] or 1231(b)(3) [withholding of removal] of this title and is based on changed conditions arising in the country of nationality” By restricting the time frame in which an asylum seeker can file a motion to reopen and remain eligible for asylum, the Proposed Rules indirectly accomplish what the statute says they cannot do: place a time limit on the filing of a motion to reopen based on changed country conditions.

3. Several of the discretionary “bars” are nonsensical as written or as applied.

While several of the discretionary bars in the proposed rules are inconsistent with the statute, others are incoherent or nonsensical, as written and/or as applied, and serve no purpose other than to dramatically limit access to asylum. The first two discretionary bars would result in the denial of asylum to an asylum seeker who (1) “spent more than 14 days in any one country” prior to his arrival in the United States or en route to the United States, with two minor exceptions, or who (2) “[t]ransits through more than one country between his country of citizenship, nationality, or last habitual residence and the United States,” with minor exceptions.²⁰⁸

These two Proposed Rules constitute a dramatic departure from the current regulations and case law regarding the discretionary determination in an asylum case and the Departments have offered no evidence to support this dramatic change or for the specific framework established in the Proposed Rules. The Proposed Rules assert that these two factors are supported by current firm resettlement case law, but offer no explanation for why 14 days was chosen as the relevant time period or why 14 days is particularly determinative of an individual having firmly resettled in another country. As explained further in Section X *infra*, the Proposed Rules provide no basis or explanation for why the mere transit through another country relates to the firm resettlement bar when “transit” has nothing to do with “resettlement.”

Taken together, these two Proposed Rules, which would effectively operate as a bar, could result in the mass denial of all asylum seekers who are citizens of countries other than Mexico or who do not have the good fortune of securing a direct flight from their home country to the United States. Under the proposed rule, an asylum seeker from Ethiopia who had a 12-hour layover in Germany en route to the United States would face the same discretionary bar as an asylum seeker from Iran who spent 15 days in France en route to the United States, and as an asylum seeker from Togo who spent two years living in Ghana before traveling on to the United States.

²⁰⁸ 85 Fed. Reg. at 36293, 36302.

Treating these three categories of asylum seekers the same and denying them all asylum as a matter of discretion makes no sense and has no connection to the firm resettlement bar or any other statutory basis for denying asylum. The only basis for treating them as such is if the goal is to deny asylum to as many people as possible in whatever way possible.

C. The Proposed Rules Have No Relevance to the Legitimacy of an Asylum Claim or the Use of Discretion in Immigration Proceedings.

When a bar to asylum does not relate to a safety or security concern, Congress has been clear that the bar should not prevent legitimate asylum seekers from obtaining protection. For example, during the debate over what became the one-year filing deadline, both supporters and opponents of the deadline focused on the need to protect legitimate refugees. Supporters of the provision acknowledged the need for “adequate protections” to protect legitimate refugees²⁰⁹ and “to ensur[e] that those with legitimate asylum claims are not returned to persecution.”²¹⁰

In contrast, the Proposed Rules create discretionary bars that have no relevance to the legitimacy of an asylum claim. Among the most problematic of these new bars are those related to a failure to timely file tax returns, satisfy tax obligations, or report taxable income.²¹¹ Whether an asylum seeker was able to satisfy her tax obligations has no bearing on the legitimacy of the asylum seeker’s claim for protection. Rather, it is reflective of whether the asylum seeker has the education, financial resources, and language ability to navigate the U.S. tax system, while likely still coping with the trauma that caused her to flee to the United States in the first place, still recovering from time spent in immigration detention, and attempting to meet her family’s basic needs for food and shelter without employment authorization or access to any public benefits.

Requiring a “discretionary” denial of asylum for these kinds of factors turns the current discretionary rubric on its head. As noted earlier, *Matter of Pula* established that “the danger of persecution should generally outweigh all but the most egregious of adverse factors.”²¹² The Proposed Rules flip this principle, mandating that adjudicators deny asylum as a matter of discretion for the most minor of adverse factors.

²⁰⁹ 142 CONG. REC. S11491 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch)

²¹⁰ 142 CONG. REC. S11840 (daily ed. Sept. 30, 1996) (pre-vote colloquy between Sen. Abraham and Sen. Hatch).

²¹¹ 85 Fed. Reg. at 36293, 36302.

²¹² *Pula*, 19 I. & N. Dec. at 474.

X. The Proposed Rules Introduce an Unprecedented Expansion of the Firm Resettlement Bar.

The proposed changes to 8 C.F.R. § 208.15 and § 1208.15 significantly expand the definition of firm resettlement to bar to any asylum seeker who “could have resided” in renewable or permanent legal immigration status—a sharp departure from the current requirement that asylum seekers receive an offer of permanent status in the country of transit. Furthermore, the rule introduces a new requirement to demonstrate torture or persecution for asylum seekers whose journey keeps them in transit for one year or more in one country. Finally, the rule unreasonably targets minors.

A. As Envisioned by Congress, the Firm Resettlement Bar is a Narrow Exception to Asylum; Under These Proposed Rules, the Exception Swallows the Rule.

Although Congress did not codify firm resettlement until 1996,²¹³ Congress intentionally restricted the concept of resettled individuals to those “had begun to build new lives” in a third country prior to reaching the United States.²¹⁴ In other words, asylum seekers were not resettled by merely transiting through a third country.²¹⁵ Rather, resettled individuals must have stable and permanent status that shields them from return to the conditions they fled and enables them to lay new roots. The BIA has followed Congress’s intent by applying this bar to individuals who have spent eight to thirteen years in their country of transit, married, found stable employment, and had a viable offer of permanent status.²¹⁶ Circuit courts have further clarified that to be firmly resettled, an individual must receive an offer of permanent resident status, citizenship, or some other type of permanent resettlement.²¹⁷

The current regulatory scheme respects Congress’ narrow lens for firm resettlement. DHS is required to prove that the availability of an offer of permanent status. If DHS meets that burden, the asylum seeker can rebut the evidence by showing that they did not receive an offer of firm

²¹³ For a detailed history, see *Matter of A-G-G-*, 25 I. & N. Dec. 486, 489-94 (BIA 2011).

²¹⁴ *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 (1971).

²¹⁵ The Departments assume that any and all signatories to the Refugee Convention provide *de jure* and *de facto* pathways to permanent status to asylum seekers in transit, creating “increased availability of resettlement opportunities” for most asylum seekers from non-contiguous nations. 85 Fed. Reg. at 36285 n. 41. The ample ways in which these very Proposed Rules undermine the Refugee Convention should make these Departments pause in making such a slippery and ill-founded inference.

²¹⁶ See *Matter of A-G-G-*, 25 I. & N. Dec. 486, 489-94 (BIA 2011) (applying to respondent who lived for eight years in Senegal, had stable and lawful employment, married and had two children, and had pathway to permanent residency through marriage); *Matter of Kwan*, 14 I. & N. Dec. 499 (Reg. Comm’r 1973) (individual who lived in Hong Kong for thirteen years and had benefits of permanent residence was resettled).

²¹⁷ See *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001); *Naizghi v. Lynch*, 623 Fed. Appx. 53 (4th Cir. 2015); *Lara v. Lynch*, 833 F.3d 556 (5th Cir. 2016); *Haghighatpour v. Holder*, 2011 U.S. App. LEXIS 22011 (9th Cir. 2011).

resettlement or that did not qualify for the status. If the judge concludes that the applicant resettled, asylum seekers can appeal to two exceptions to ensure that applicants are not improperly barred from asylum.²¹⁸ Specifically, asylum seekers have not resettled if they either remained in the third country only as long as was necessary without establishing significant ties or faced “substantially and consciously restricted” conditions in that country.²¹⁹ These exceptions are consistent with Congress’ desire to welcome refugees who have faced long journeys and hardships on their way to seeking safety and permanent shelter in the United States.

In contrast, the Proposed Rules both relieve DHS of its burden and strip asylum seekers of these two defenses, without justification.²²⁰ The proposed regulation’s attempt to bar asylum for anyone who “could have applied” for permanent or “nonpermanent” status in the third country sets virtually no reasonable limits on the firm resettlement bar. Once a narrow exception, the firm resettlement bar would now apply to nearly all applicants. Such a broad, nonsensical definition of “firm” “resettlement” raises serious questions as to the Departments’ use of Congress’ plain words. This new definition is both a shield and a sword working for DHS: any potential to get nonpermanent status would shift the burden to asylum seekers, who have no means to rebut a sheer possibility. To further ensure that no asylum seeker can survive this bar, the Departments further crossed off the sensible exceptions of the current rule, leaving no recourse for asylum seekers.

To support their contention, the Departments rely on a skewed interpretation of two seminal BIA cases. In *Matter of K-S-E-*, the BIA decided that a Haitian man had a viable offer of permanent residence but for “ministerial acts” that would not “pose any significant obstacles.”²²¹ In that case, the respondent had an *actual* offer for permanent status in Brazil that he merely had to accept.²²² Similarly, in *Matter of A-G-G-* a Mauritanian man spent eight years in Senegal, married a Senegalese woman, and had two children with her before arriving in the United States. Though he did not apply for permanent residence, the BIA found that DHS had presented indirect evidence that he had a viable offer of citizenship through his marriage based on a “sufficient level of clarity and force to indicate that the third country officially sanctions the alien’s indefinite presence.”²²³ In other words, the BIA recognized that the respondent had built a

²¹⁸ See 8 CFR § 1208.15(a-b).

²¹⁹ *Id.*

²²⁰ Under the framework laid out in *Matter of A-G-G-* and followed by circuit courts, DHS bears the burden of presenting *prima facie* evidence of an offer of firm resettlement and has to secure and produce the relevant evidence. 25 I. & N. Dec. 486, 501 (BIA 2011). Under the proposed regulation, adjudicators may require the asylum seeker to prove the bar does not apply where there is no *prima facie* evidence of firm resettlement in the record.

²²¹ 27 I. & N. Dec. 818, 819 (BIA 2020).

²²² *Id.* at 820 (“Not only did the Brazilian Government have a program that would allow the respondent to apply for permanent status, but in his case, there was an actual offer to participate in the program.”).

²²³ *Matter of A-G-G-*, 25 I. & N. Dec. 486, 502 (BIA 2011).

life in Senegal and had a pathway to citizenship at his fingertips. These facts and analysis stand in stark contrast with the broad language of the Proposed Rules, which impute potential offers of any form of status (permanent or not) on transiting asylum seekers.

B. The Proposed Rules is a Nesting Doll for New, Insurmountable Barriers to Asylum.

The Proposed Rules arbitrarily excludes asylum seekers who spent one year in a country of transit, regardless of whether they resettled. Within this rule are two significant barriers that will prevent countless applicants from bringing forth their claims: (1) a new one-year bar and (2) a heightened requirement to prove double torture or persecution. Although the Departments recognize that the definition of firm resettlement “has remained the same for nearly thirty years,” they proceed to redefine it to include any individuals who resided in a country of transit for one year.²²⁴ No offer of permanent or nonpermanent status is necessary. Instead, the Departments presume that the mere passage of time in one country suffices to show that an individual has resettled, regardless of how poor or unstable the conditions in that country were for the asylum seeker.

The Departments provide no justification for creating this new one-year bar—a clear usurpation of Congress’ authority to define the bounds of asylum eligibility.²²⁵ As discussed prior, courts have found resettlement after examining offers of permanent status and a near decade or more of established roots in a third country. There is no logical basis for the Departments to brush aside any consideration of the stability and viable status of the asylum seeker, simply because an asylum seeker took a year to travel through a third country. The Departments further ignore factors such as the size and conditions of the country as well as the asylum seeker’s means and ability to travel through this country. For many asylum seekers—including children, individuals with mental or physical disabilities, low-literacy levels, indigenous individuals who cannot understand and navigate the country of transit, or indigent persons—the length of time spent in the country of transit is not within their control. By inserting a new one-year bar, the Departments will impose arbitrary and unreasonable barriers on the most vulnerable asylum seekers.

Importantly, the Proposed Rules fails to clarify if this one-year bar would apply to the tens of thousands of asylum seekers currently forced to remain in Mexico under the Migrant Protection Protocols (MPP). NIJC represents many asylum seekers in this program who have been extorted, physically assaulted, kidnapped, and raped while awaiting entry into the United States. The fact

²²⁴ 85 Fed. Reg. at 36285.

²²⁵ As discussed in this comment, Congress already provided for a one-year bar to asylum that was the product of extensive legislative scrutiny. *See generally* Karen Musalo and Marcelle Rice, *The Implementation of the One-Year Bar to Asylum*, 31 *Hastings Int'l & Comp. L. Rev.* 693 (2008).

that the rule fails to clarify if this bar would apply to these already victimized asylum seekers further illustrates the absurdity of this new bar.²²⁶

Second, the Departments would require those individuals to prove persecution or torture from country of transit merely to rebut DHS' *prima facie* case. The requirement to prove double persecution or torture (from the countries asylum seekers flee *and* transit through) imposes an unreasonable burden for asylum seekers. It also stands in sharp contrast with the threshold of the current rule's defense, where asylum seekers can show that the conditions in the country of transit were "substantially or consciously restricted" in consideration of multiple factors.²²⁷ In other words, this rule would permit DHS to meet its burden by merely pointing to sheer passage of time, while respondents' opportunity for rebuttal would be to mount a second asylum or CAT claim merely to rebut DHS' presumption. Asylum seekers and torture survivors who appear *pro se* will be unlikely to meet this formidable challenge, while represented respondents will need continuances to competently meet their evidentiary burden. In either scenario, this proposed change is a recipe for unfair and inefficient adjudications of the asylum seeker's underlying claim.

It is further unclear how AOs and IJs will ensure that asylum seekers will not be refouled or returned to the country of transit, even where they faced persecution or torture in the country of transit. NIJC has represented and interviewed asylum seekers who have expressed such fears under MPP. Even where those individuals are granted non-refoulement screenings centering on the persecution and torture they feared in Mexico, they were returned to Mexico. In the case of an LGBTQIA+ asylum seeker NIJC represents, U.S. officials returned him to Mexico anyway, only to be abducted the very same night. This man's fate illustrates the warning recently issued by AOs—namely that MPP "virtually guarantees" a violation of the U.S.'s *non-refoulement* obligations.²²⁸ The proposed regulations provide no safeguard to avert a new iteration of MPP's unlawful track record.

Finally, the proposed regulation provides that the firm resettlement of an individual's parents will be imputed to a child who turns 18 and resided with their parent at the time of the firm resettlement, unless the child establishes that they could not have derived status from the parent. Unemancipated children have no control over their parents' choice of residence. Their reliance

²²⁶ The rule specifies that the individual must voluntarily reside in the country of transit for one year or more. However, Senior DHS officials have touted MPP as a successful "humanitarian" program, so it is unclear whether asylum seekers in this program will be deemed to "voluntarily" reside in Mexico. *See, e.g.*, Press Briefing by Acting CBP Commissioner Mark Morgan, WhiteHouse.gov (Nov. 14, 2019) <https://www.whitehouse.gov/briefings-statements/press-briefing-acting-cbp-commissioner-mark-morgan-2/>.

²²⁷ *See* 8 C.F.R. § 208.15(b).

²²⁸ *See* Andrew Peterson, *Asylum Officers: Remain in Mexico 'Virtually Guarantees' Unlawful Removal of Asylum Seekers*, LawFareBlog.org (June 28, 2019), <https://www.lawfareblog.com/asylum-officers-remain-mexico-virtually-guarantees-unlawful-removal-asylum-seekers>.

on their parents to provide basic necessities such as food and shelter take precedence over their understanding of asylum law. By imputing the purported “choice” of their parents to stay in a third country on a child, the Departments undermine basic principles of child welfare, family unity, and due process for children. In essence, this imputation penalizes children for being children and deprives them of child-centered adjudication required under international law.²²⁹

XI. The Departments’ CAT revisions are cruel, confusing, and unlawful vehicles to send survivors back into the hands of their torturers.

The Proposed Rules proposes modifying the standard for protection under CAT to limit the accountability of foreign governments as to the torturous conduct inflicted either at the hand of government actors directly or by private individuals, acting with the government’s acquiescence. Specifically, the Rule seeks to eliminate accountability for torture inflicted by “rogue” government actors and curtail accountability for torture inflicted by private actors.

Under the Proposed Rule, pain or suffering inflicted by, or at the instigation of or with the consent or acquiescence of, a public official is not torture unless it is done while the official is acting in his or her official capacity (i.e. under “color of law”). Additionally, only a government actor who is acting “under color of law” can acquiesce in torturous conduct by private actors. Further, under this Rule, the concept of “willful blindness” as it relates to a government official’s reaction to torture by private actors requires the government official to be “aware of a high probability of activity constituting torture and deliberately avoided learning the truth.” A reckless or negligent disregard for the truth is not enough. These proposed changes are nonsensical and illegal for many reasons.

A. Circuit Courts Have Rejected the Department’s proposed definition of acquiescence and rogue official.

The Departments’ definition of willful blindness bears striking resemblance to the discredited and oft-overruled definition of “willful acceptance” in *Matter of S-V-*, which states: “the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must demonstrate that the Colombian officials are willfully accepting of the guerillas’ torturous activities. . . . To interpret the term [acquiescence] otherwise would be to misconstrue the meaning of ‘acquiescence,’ the dictionary definition of which is ‘silent or passive assent.’”²³⁰ Similarly, the Departments state in their definition that “it

²²⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: <https://www.refworld.org/docid/4b2f4f6d2.html> [accessed 3 July 2020].

²³⁰ 22 I. & N. 1306 (citations omitted).

is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire.”²³¹ The striking resemblance between the rejection of silence/passivity and reckless disregard, mistake, or neglect echo the definition of *Matter of S-V-*, which explicitly rejected willful blindness and adopted willful acceptance instead.

Although the Rule appears intent to resurrect the definition of “willful acceptance”²³² (an iteration of actual knowledge) in its new definition of willful blindness, several Circuits and the Senate Committee on Foreign Relations permitting a broader use of willful blindness.²³³ In fact, nearly every circuit in the country has addressed the concept of willful blindness and settled on an approach that is more permissive than the one in this Proposed Rule.²³⁴ Therefore, the Departments’ definition is confusing at best, unlawful at worst—collapsing two definitions that federal courts have long distinguished and lowering the threshold of awareness required to constitute willful blindness.

With the addition of “rogue official,” the Departments are also attempting to codify a discredited prior analysis, in this case *Matter of O-F-A-S-*, 27 I. & N. Dec. 709 (BIA 2019), which adopts the “rogue official” definition as a silent exception to the requirement that officers act under color of law. Like the Departments, IJs have erroneously relied on a “rogue actor” exception to find that police officers and military officials who rape, extort, or severely beat private citizens are not acting under color of state law, reasoning that these sorts of actions can have no legitimate purpose, so the only explanation is that the officer was “rogue” in his conduct. This approach demonstrates that this concept is elusive to adjudicators and this rule will return more torture survivors to harm. This proposed change would require foreign government license to torture, where the torturer is literally “deputized” to act on behalf of the government.²³⁵

²³¹ 85 Fed. Reg. at 36294, 36303 (to be codified at 8 C.F.R. §§ 208.18, 1208.18).

²³² *Matter of S-V-*, 22 I. & N. Dec. 1306 (BIA 2000).

²³³ See *Zheng*, 332 F.3d at 1195 (overruling *Matter of S-V-* and noting that “[t]he Senate Committee on Foreign Relations expressly stated that the purpose of requiring awareness, and not knowledge, ‘is to make it clear that both actual knowledge and ‘willful blindness’ fall within the definition of the term ‘acquiescence.’”); *Amir*, 467 F.3d at 927 (overruling *Matter of S-V-* because BIA failed to include willful blindness in its definition).

²³⁴ See *Zheng v. Ashcroft*, 332 F.3d 1186, 1197 (9th Cir. 2003) (rejecting need for official to be “willfully accepting” of torturous activity, finding instead that willful blindness and awareness suffice); *Khouzam v. Ashcroft*, 361 F.3d 161, 170-71 (2d Cir. 2004) (Willful blindness is equivalent to “awareness” of the activity constituting torture.); *Mouawad v. Gonzales*, 485 F.3d 405, 413 (8th Cir. 2007) (“A government does not acquiesce in the torture of its citizens merely because it is aware of torture but powerless to stop it, but it does cross the line into acquiescence when it shows willful blindness towards the torture of citizens by third parties.”); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006) (Willful blindness falls within the definition of acquiescence.); *Silva-Rengifo v. Attorney General*, 473 F.3d 58, 68 (3d Cir. 2007) (“[T]he definition of ‘acquiescence’ includes both actual knowledge and ‘willful blindness.’”); *Hakim v. Holder*, 628 F.3d 151, 157 (5th Cir. 2010) (distinguishing willful acceptance and willful blindness). See also *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 247 (4th Cir. 2013) (distinguishing actual knowledge and willful blindness).

²³⁵ 85 Fed. Reg. at 36287.

Many Circuit courts have rejected a “rogue official” exception to torturous conduct in the CAT context.²³⁶ As those courts have explained, it is cruel and inconsistent with the purpose of CAT to carve out a statutory exception where torture survivors must demonstrate that their torturer was not a “bad apple” in order to win protection. When government officials engage in misconduct, abusive or even corrupt behavior, they do not shed their public cloak.²³⁷

B. The Proposed Rules is Rigid and Formalistic.

The Proposed Rules imposes an overly rigid and formalistic approach that is inconsistent with the actual functioning of many foreign governments. For example, in countries with a weak central government or a corrupt police force (as is the case in many CAT claims), expecting a government official to have direct knowledge of torture by private actors (like tribes, gangs, or private security forces) is unrealistic and would eliminate access to protection for conduct that the CAT is meant to protect against.

C. The Proposed Rules needlessly complicates CAT claims.

Adding a “color of law” component to CAT claims adds yet another complicated legal concept to an already overly complicated legal analysis. Many applicants for CAT protection proceed *pro se*, and expecting them to understand and apply this complicated concept is not viable.

²³⁶ *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017) (“The statute and regulations do not establish a ‘rogue official’ exception to CAT relief The four policemen were “public officials,” even though they were local police and state or federal authorities might not similarly acquiesce. Since the officers were apparently off-duty when they tortured Barajas-Romero, they were evidently not acting ‘in an official capacity,’ but the regulation does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts.”); *Khouzam*, 361 F.3d at 171 (“To the extent that these police are acting in their purely private capacities, then the ‘routine’ nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either know of the torture or remain willfully blind to the torture and breach their legal responsibility to prevent it.”); *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014) (“[A]n act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 901 (“[T]he use of official authority by low-level officials, such a[s] police officers, can work to place actions under the color of law even where they are without state sanction.”); *Barajas-Romero v. Lynch*, 846 F.3d 351, 362 (9th Cir. 2017) (“The statute and regulations do not establish a ‘rogue official’ exception to CAT relief The four policemen were “public officials,” even though they were local police and state or federal authorities might not similarly acquiesce. Since the officers were apparently off-duty when they tortured Barajas-Romero, they were evidently not acting ‘in an official capacity,’ but the regulation does not require that the public official be carrying out his official duties, so long as he is the actor or knowingly acquiesces in the acts.”).

²³⁷ *Barajas-Romero*, 846 F.3d at 362.

There is no need to raise the CAT standard. It is already the case that 98% of individuals who seek protection under the CAT are denied that relief.²³⁸ Making the relief harder to obtain undermines U.S. treaty obligations under the Convention to refrain from deporting people to torturous circumstances.

One notable case that likely would not have survived the Proposed Rule's standard is *Avendano-Hernandez v. Lynch*.²³⁹ There, the Petitioner, a transgender woman from Mexico was repeatedly raped and sexually abused, by police officers and military officials. The government argued vigorously that these actors were engaged in clearly illegal activity and were thus "rogue." The Court "reject[ed] the government's attempts to characterize these police and military officers as merely rogue or corrupt officials. The record makes clear that both groups of officers encountered, and then assaulted, Avendano-Hernandez while on the job and in uniform. Avendano-Hernandez was not required to show acquiescence by a higher-level member of the Mexican government because "an applicant for CAT relief need not show that the entire foreign government would consent to or acquiesce in [her] torture."²⁴⁰ Were these Proposed Rules to become final, Ms. Avendano Hernandez would be deported back to her torturers in violation of U.S. and international law.

XII. In the Proposed Revisions to Information Disclosure Requirements, the Departments Disturb the Safeguard of Confidentiality for Vulnerable Asylum Seekers.

The Proposed Rules would significantly alter the confidentiality protections for asylum seekers currently enshrined in 8 C.F.R. §§ 208.6 and 1208.6. The Departments state that the intent of the proposed changes is to ensure that existing confidentiality provisions are not being used to shield fraud and abuse. The Departments admit, however, that existing regulations that govern the disclosure of information contained in or pertaining to asylum applications, credible fear records, and reasonable fear records, *already* permit disclosure of confidential information to any U.S. government official or contractor having a need to examine information in connection with the adjudication of an asylum application or consideration of a credible fear claim.²⁴¹

Still, the Rule proposes changes to expressly allow the disclosure of information in an asylum application "as part of a federal or state investigation, proceeding, or prosecution; as a defense to any legal action relating to the alien's immigration or custody status; an adjudication of the

²³⁸ See U.S. Dep't of Justice, Exec. Office of Immigration Review, Statistics Yearbook: FY 2018, Tbl. 16, <https://www.justice.gov/eoir/file/1198896/download> (last visited June 18, 2020) (showing 69,618 total applicants for CAT protection, and only 1,334 grants of withholding or deferral of removal).

²³⁹ 800 F. 3d 1072 (9th Cir. 2015).

²⁴⁰ *Id.* at 1080.

²⁴¹ 85 Fed. Reg. at 36288.

application itself or an adjudication of any other application or proceeding arising under the immigration laws; pursuant to any state or federal mandatory reporting requirement; and to deter, prevent, or ameliorate the effects of child abuse.”²⁴² Without any valid justification, the Rule proposes changes that would allow the government to use a non-citizen’s fear-based claim against them, in ways that could prevent them from obtaining other benefits or concessions, and hinder them from seeking asylum due to fear of reprisal.

As explained below, the Departments proposed revisions will inhibit asylum seekers from making essential disclosures and particularly harm the most vulnerable asylum seekers. Additionally, the Proposed Rules will interfere with privacy rights and would open the door to unsubstantiated and dangerous allegations. Finally, the Departments’ supply no reasonable justification for their presumption of fraud and abuse of the asylum system.

A. Compromising the Confidentiality of Asylum Records Will Chill Asylum Seekers, Including Children and Survivors of Domestic and Sexual Violence.

AOs and IJs elicit painful, traumatic, and private confidences from asylum seekers on a daily basis.²⁴³ Their only tool to comfort asylum seekers is strict safeguard against disclosure of these confidences. If the Proposed Rules goes into effect, this safeguard will be a relic of the past. The Proposed Rules set forth a new set of vaguely worded circumstances that would allow for the disclosure of asylum records, without any clear limitations as to whom it may be disclosed. Ensuring a certain level of confidentiality critical to allow for asylum seekers to fully disclose the details of their claim, as full disclosures are critical to a survivor’s chances to survive expedited removal. Yet, under the Proposed Rules, no real assurances of confidentiality can be given. When a person is fearful for their life, and worried that the information they are sharing could be used against them, it limits their willingness to seek help, tell their whole story, trust the system, or pursue legal cases.

The stripping away of existing confidentiality protections will particularly hurt children and survivors, who are already weary of sharing the nature of their fear. The Proposed Rules would allow for confidential information of asylum seekers to be disclosed for the government’s defense of any legal action relating to the asylum seeker’s immigration or custody status. As stated prior, candid and comprehensive disclosures are key to reliable asylum adjudications. For children or women fleeing domestic abuse, this carve-out can torpedo their ability to share their story. Additionally, asylum seekers are often already scared and traumatized, leading to their

²⁴² 85 Fed. Reg. at 36288.

²⁴³ The disclosures themselves can trigger asylum seekers, making the prospect of interviews and testimony beyond unsettling; the scarce comfort they can derive from protection against the disclosure of their information can hardly be overstated. See Katrin Schock et al., *Impact of asylum interviews on the mental health of traumatized asylum seekers*, 6 European J. Psychotraumatology (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4558273/>.

inability to disclose their asylum claim during CFIs.²⁴⁴ The Departments' proposed changes will further undermine asylum seekers' trust that they can share confidences without risking retaliation; this, in turn, will lead to truncated or faulty adjudications.

Additionally, this would harm asylum seekers who are currently subject to abusive relationships in the U.S. Abusers frequently lodge false accusations against victims to retaliate if they report abuse, or to manipulate them to reinforce control over their lives.²⁴⁵ Asylum seekers simultaneously experiencing domestic violence in the U.S. will be at the mercy of abusers who report victims to law enforcement for fabricated allegations of crime, child abuse, or immigration violations.

Such risks are recognized by the current protection of sensitive information other than in exceptional circumstances. With the new changes, survivors will be both penalized for withholding any information about their fear of harm, and at the same time could also be deterred from disclosing critical details if they fear disclosure of such information. NIJC represents clients who could be at risk of being falsely accused of failing to protect their children based on information in their asylum application relating to the abuse they are experiencing. An abuser could easily call a DHS tip-line, for example, and falsely accuse an NIJC client of immigration fraud to prompt DHS to launch an investigation, accessing their immigration files, and placing their asylum claim at risk.

B. The Changes Threaten the Privacy of Asylum Seekers and May Impair Adjudications.

The proposed changes pose new threats to the rights of asylum seekers. The existing regulations already allow for information sharing between government Departments to investigate asylum seekers for criminal or civil matters, which may include allegations of fraud or perjury.²⁴⁶ The proposed changes broaden the authority of government officials, however, to share information on immigrants that could put them at risk of reprisals or anti-immigrant violence. The proposed changes could have a chilling effect on asylum seekers' disclosures and ability to reach finality in their decision; due to the adversarial character of proceedings, asylum seekers may fear retaliatory leaks of their private disclosures from DHS to their persecuting country merely for seeking full adjudication of their claims.

²⁴⁴ See Comment of Ronda Doe, *supra* n. 164.

²⁴⁵ See generally, Dutton, Mary; Leslye Orloff, and Giselle Aguilar Hass. 2000. "Characteristics of Help-Seeking Behaviors, Resources, and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications." *Georgetown Journal on Poverty Law and Policy*. 7(2); Orloff, Leslye and Janice V. Kaguyutan. 2002. "Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses." *Journal of Gender, Social Policy, and the Law*. 10(1): 95-183.

²⁴⁶ 8 CFR § 208.6(c)(v).

NIJC's clients will be impacted by the proposed changes that loosen restrictions on information disclosures. The changes would allow government Departments to share confidential information relating to NIJC clients with domestic and foreign law enforcement Departments that could put asylum seekers at risk. NIJC has represented asylum seekers, for example, who were separated from their children based on unsubstantiated information provided by foreign governments.²⁴⁷ The proposal to loosen restrictions on information sharing programs could increase information sharing between U.S. government Departments, and foreign governments, putting more asylum seekers at risk of family separation due to unsubstantiated suspicions.

C. The Proposed Rules Are a Renewed Attempt to Vilify and Criminalize Asylum Seekers.

The new regulations mischaracterize the existing regulatory regime, by asserting that the current system allows for criminal activity to be shielded from investigation and prosecution. Yet, it presents no evidence that existing confidentiality protections impede criminal investigations or prosecution in any way.

The Proposed Rule claims that, "improper duplication of applications or claims...directly relate to the integrity of immigration proceedings."²⁴⁸ However, the process of applying for fear-based protection is already extremely complicated and the government places numerous restrictions and roadblocks that easily result in duplication or at least redundancy in asylum claims that are not attributed to the applicant, and are not reflective of the integrity of the proceedings themselves. Rather, such situations present a clear opportunity for the adjudicator to consolidate matters and contested issues.

The Departments' focus on criminal investigations and fraudulent applications is pretextual at best. The proposed changes confirm the recent executive trend to criminalize asylum seekers²⁴⁹

²⁴⁷ See Statement of the National Immigrant Justice Center (NIJC), U.S. House Judiciary Committee Hearing Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody under the Trump Administration, July 25, 2019, <https://www.congress.gov/116/meeting/house/109852/documents/HHRG-116-JU00-20190725-SD014.pdf>.

²⁴⁸ 85 Fed. Reg. at 36288.

²⁴⁹ See, e.g., Human Rights First, "Stoking Fears and Peddling Lies: The Trump Administration's Attacks on Asylum" (last accessed July 15, 2020) available at <https://www.humanrightsfirst.org/sites/default/files/Stoking-Fear-and-Peddling-Lies.pdf>.

and presume abuse of the system without basis,²⁵⁰ rather than abide by the Departments' mandate to create a safe haven for refugees.²⁵¹

Conclusion

The Departments fail to abide by their obligations under U.S. and international law and usurp Congress's role as the architect of our asylum system. This should suffice for the immediate rescission of these proposed Rules. But the plethora of confusing and nonsensical changes further undermines the Departments' duty to put forth reasonable rulemaking. NIJC urges the Departments to rescind these Proposed Rules and abide by their duty to protect asylum seekers and torture survivors.

²⁵⁰ See "Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review," Oct. 12, 2017, <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review>.

²⁵¹ Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 102, 105 (1980).